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DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 79-631 and 79-1103

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*, APPELLANTS,

v.

2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC., *et al.*, APPELLEES.

No. 79-1102

GOLD DEPOSITORY AND LOAN COMPANY, INC., APPELLANT,

v.

2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC., *et al.*, APPELLEES.

Appeals from the Superior Court of the District of Columbia
(Hon. William E. Stewart, Jr., Trial Judge)

(Argued June 17, 1981 Decided February 2, 1982)

E. Leo Backus for appellants in Nos. 79-631 and 79-1103.

John H. MacVey for appellant in No. 79-1102.

Richard A. Hibey, with whom *Robert B. Wallace* was on the briefs, for appellees.

Before HARRIS, MACK, and PRYOR, *Associate Judges*.

[174]

HARRIS, *Associate Judge*: Appellees, a District of Columbia cooperative housing association and individual members of the cooperative, brought suit in Superior Court charging appellants, former officers and/or directors of the cooperative and various related corporate entities, with breach of fiduciary duty and breach of contract.[1] Appellants challenge the trial court's findings —made after a nonjury trial—of breach of contract and breach of fiduciary duty and the resulting cancellation of indebtedness, transfer of title to several apartment units to the cooperative, invalidation of several provisions of the deed of trust, and award of nominal and punitive damages and attorneys' fees. Appellant Gold Depository and Loan Company (GDLC) seeks reversal of the post-judgment issuance of an injunction on August 10, 1979, preventing it from selling certain cooperative apartments in violation of the final judgments and injunctive order of April 27, 1979. In addition, appellant Laurins disputes the August 10, 1979, finding that he was in civil contempt for noncompliance with the April 27, 1979, final judgment. We affirm the trial court's final judgments and order and its issuance of the injunction prohibiting the sale of apartment units by GDLC. That portion of the appeal which is directed to the civil contempt citation is moot.

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[1] The action in the trial court was brought by 2720 Wisconsin Avenue Cooperative Association, Inc., and 25 members of the cooperative. For purposes of these appeals, we refer to the plaintiffs collectively as "Cooperative." We refer to Wisconsin Avenue Associates, Inc. (Associates), Aleksandrs V. Laurins, and the following individuals and corporations collectively as "defendants": VAL Management Company, Inc., Metropolitan Mortgage Bankers, Inc., James G. Norman, Charlene Baden, Carol A. Tompkins, Wayne A. Chasen, Real Estate Equity Management, Inc., Scenic Travel, Inc., Real Development Management, Inc., Conference Management Group, Inc., and Security National Bank.

I

In November of 1974, A. V. Laurins & Company, Inc., entered into a sales contract with Marjory J. Jawish and Henry Jawish for the purchase of the building at 2720 Wisconsin Avenue, N.W. The parties agreed upon a purchase price of $750,000, consisting of a cash down payment of $75,000, the assumption of two existing mortgages, and the issuance of a third mortgage.

On December 1, 1974, 2720 Limited Partnership (an entity controlled by defendant Laurins) agreed to purchase a $945,000 note to be executed by the yet-to-be-formed 2720 Wisconsin Avenue Cooperative Association, Inc. (Cooperative), in favor of the yet-to-be-formed Wisconsin Avenue Associates, Inc. (Associates).[2]

On December 6, Cooperative and Associates signed an assignment of purchase agreement under which Associates assigned to Cooperative its right to purchase the Jawish property in exchange for a "wrap-around" mortgage in the amount of $945,000 executed by Cooperative in favor of Associates. The sales agreement prepared by defendants stated that the entire corporate indebtedness was $945,000. The settlement sheets also reflected a purchase price of $945,000. The assignment of purchase agreement further provided that Associates would advance all cash required to acquire title to the property.

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[2] The $945,000 note in favor of Associates was negotiated to 2720 Limited Partnership on December 13, 1974, to Real Development Management, Inc., on December 17, 1974, and to Co-op Mortgage Investors Limited Partnership (CMI) on December 20, 1974. All of these entities were owned or controlled by defendant Laurins. In August of 1978, the note was transferred without consideration to Co-op Investment Bankers (CIB). The trial court found that CIB was a mere continuation of CMI.

On the same date, Cooperative and Associates entered into two additional written agreements. First, Cooperative agreed to assign to Associates 100 percent of the membership interests in the cooperative for the sole purpose of selling membership interests to individual apartment purchasers. Secondly, Cooperative and Associates executed 49 mutual ownership contracts which gave Associates the power to transfer the individual apartments to the public.

On the date on which those agreements were signed, Cooperative's board of directors consisted of defendants Laurins, Norman, Baden, Chasen, and Tompkins. The members of the board of directors of Associates then were Laurins, Norman, and Baden. The assignment of purchase agreement was signed on behalf of Cooperative by Laurins and attested to by Baden. Laurins recognized that he owed a fiduciary duty to Cooperative as of that date.

On December 16, 1974, Cooperative executed another note in favor of Associates in the amount of $100,000. An additional note was executed in favor of Associates on September 1, 1975, in the amount of $5,700. The amounts advanced to Associates, totaling $105,700, were broken down as $75,000 for the down payment to the Jawishes, $9,365.90 in closing costs, and $21,334.10 in renovation expenses. The assignment of purchase agreement provided that Associates would advance all cash necessary for acquiring title and delineated the terms of such loans. The terms of the December 16, 1974, note, however, differed somewhat from those set forth in the assignment of purchase agreement.[3] The $100,000 note

[3] The interest rate provided in the December 6, 1974, assignment of purchase agreement was 8.5%, while the $100,000 note actually carried an interest rate of only 8.0%. The payout period was reduced from 23 to 13 years, with a large ("balloon") payment to be made at the end.

was alluded to in a footnote to the 1974-75 budget; however, there the loan was listed as being in the amount of $84,366 and no interest rate was stated.

Two items of non-recurring income were included in the 1975 maintenance budget as "Estimated Income Items": $9,200 in membership fees and $6,900 in first-year principal payments.[4] These items were used to defray the maintenance expenses for the first year. Largely as a result of the non-recurring nature of these income items, the maintenance budget for the following year increased by 37 percent. Additionally, VAL Management Company, the Laurins-controlled property management organization, was late in preparing the 1976 budget and released the budget in the form of a notice of increase in fees.

On March 18, 1976, Cooperative brought suit in Superior Court charging defendants with breach of fiduciary duty and breach of contract. The trial court ordered that the nonjury trial be bifurcated on the issues of liability and damages.

On October 6, 1976, Associates executed 12 promissory notes in favor of 2720 Limited Partnership. Those notes were secured by the pledge of 11 mutual ownership contracts. Later, the notes were assigned to Co-op Mortgage Investors Limited Partnership (CMI), a Laurins-controlled partnership.[5] On January 5, 1978, Associates executed another promissory note in favor of Management Services Group, Inc., another Laurins-controlled

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[4] Principal payments began November 1, 1975. No principal payments were required in the first year.

[5] Real Estate Equity Management, a named defendant in the Superior Court litigation, was the sole general partner of CMI.

corporation. That note was secured by the pledge of nine mutual ownership contracts.

On June 27, 1978, the trial judge issued his memorandum opinion on the liability issue. The court found that the promoters had breached their fiduciary duty by failing to advise cooperative members of the extent of the financial obligation they were undertaking. Although the court found the disclosure of the $945,000 note to be sufficient, it found that defendants failed to disclose adequately the existence of the $100,000 and $5,700 notes and to sustain their burden of showing the fairness of those transactions to Cooperative. Additionally, the court found that the terms of the $100,000 note were altered significantly to the detriment of Cooperative, and, consequently, that their inclusion constituted an overreaching. *See* note 3, *supra*. The court held that Cooperative would be obligated on those notes only to the extent that it received value. A further breach of fiduciary duty was found in Laurins' failure to disclose the anticipated increase in the 1976 maintenance budget. The court, however, found that the breach of fiduciary duty did not rise to the level of fraud.

The court invalidated four provisions of the deed of trust as oppressive and contrary to public policy. First, the court found that the provision which held Associates harmless from attorneys' fees or costs incurred regardless of the outcome of litigation violated the general rule that each party must bear its own costs of litigation. Second, the court struck down the paragraph which provided that the entire debt would be accelerated if a purchaser attempted to resell his unit as an unreasonable restraint on alienation. Next, the court found that the paragraph which provided that Cooperative's members could not prepay the participating financing without defendants consent was unenforceable as a severe impair-

ment of the marketability of the units. Finally, the court declared void the provision that the $945,000 note would become due in full if the deed of trust were adjudicated null and void by a court.

The trial court also concluded that Associates breached its contractual duty to convey the units to purchasers and to prepare the apartments. The court enjoined defendants and all parties in active concert with them from selling or leasing any of the remaining unsold units. Because of Associates' breach of fiduciary duty, the court awarded attorneys' fees to Cooperative.

In addition to the individual defendants, the court held liable a number of corporate entities controlled by Laurins that had served as conduits for the various notes executed by Cooperative. The court dismissed defendants' counterclaims for tortious interference with defendants' contractual relations with tenants, damage to reputation, breach of contract, and negligent performance of contract.

On August 8, 1978, between the issuance of the trial court's liability and damage opinions, Co-op Investment Bankers (CIB) was formed. During August of 1978, the $945,000 note was transferred to CIB. At that time, the October 6, 1976, promissory notes also were endorsed over to CIB by CMI. On August 23, 1978, the October 6, 1976, notes were transferred to Gold Depository and Loan Company, Inc. (GDLC), a wholly-owned subsidiary of CIB. The January 1978 promissory note also was transferred to GDLC.

On December 18, 1978, the trial court issued its memorandum opinion on the damages issue. On the maintenance fee issue, the court concluded that although plaintiffs had established defendants' liability, they had failed to meet their burden of proof on damages. Ac-

cordingly, the court awarded nominal damages in the amount of $1 per plaintiff.

The court rescinded the contractual rights and obligations which the mutual ownership contracts for the 11 unsold apartment units sought to confer on defendants and ordered the defendants to turn over to plaintiffs all rents collected on those units plus the reasonable rental value of the units occupied by defendants.[6]

Because of the breach of fiduciary duty relating to the $100,000 note, the court awarded $30,700 in punitive damages to plaintiffs. For the misrepresentation of the maintenance budget, punitive damages of $500 per purchaser were awarded. Punitive damages for the four unconscionable provisions of the deed of trust were denied.

The court awarded plaintiffs $124,245.16 in attorneys' fees and $9,974.48 in general costs. Finally, defendants were allowed $21,334.10 in renovation costs and $9,365.90 in closing costs relating to the cancellation of $105,700 of indebtedness.

On January 23, 1979, Associates filed a Chapter XI petition in Bankruptcy Court. On March 27, 1979, that petition was dismissed on the basis that it had been filed "in bad faith and for the sole purpose of thwarting plaintiffs' rights within the pending lawsuit in D.C. Superior Court." Three days later, appellants filed a Chapter VII petition with the Bankruptcy Court. On April 27, 1979, the Superior Court entered its order and final judgments. Appellants invoked the automatic stay provision of the bankruptcy laws. The stay, however, was lifted on

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[6] Associates received credit for the maintenance fees that it had paid on those 11 units.

June 14, 1979, by Judge Whelan of the Bankruptcy Court, who noted that the petition had been filed "for the purpose of delaying and otherwise thwarting the Plaintiffs in the Superior Court proceeding and not with any eye toward any legitimate relief under the Bankruptcy Act."

On July 10, 1979, GDLC demanded payment from Associates on the January 1978 promissory note. On that date, GDLC also sent default letters to Associates concerning the October 6, 1976, promissory notes. The letters stated that failure to make payment by July 16, 1979, would result in the public sale of the 11 apartment units. On July 12, 1979, Cooperative received copies of the default letters issued by GDLC. On July 13, the court issued an order to show cause why GDLC and defendants should not be found in contempt of that portion of the court's final judgment which expressly prohibited the further sale or leasing of the apartment units in question. On August 10, 1979, the court found Laurins in civil contempt of court and enjoined GDLC from selling the apartment units. On October 30, 1979, following the delivery of the mutual ownership contracts to Cooperative in compliance with the August 10, 1979, order, Laurins was purged of contempt.

II

The trial court issued four comprehensive memorandum opinions in this case. When a case is tried without a jury, we may review both as to the facts and the law, but we may not set aside a judgment except for errors of law unless the judgment is plainly wrong or unsupported by the evidence. *See* D.C. Code 1981, § 17-305 (a). That presumption as to the validity of the trial court's findings properly exists, inasmuch as the trial court heard the witnesses' testimony and evaluated their credibility. *See, e.g., Edmund J. Flynn Co. v. LaVay,*

D.C.App., 431 A.2d 543, 546 (1981); *In re A.B.H.*, D.C. App., 343 A.2d 573, 575 (1975); *Johnson & Jenkins Funeral Home, Inc. v. District of Columbia*, D.C.App., 318 A.2d 596, 597 (1974); *Lee Washington, Inc. v. Washington Motor Truck Transportation Employees Health and Welfare Trust*, D.C.App., 310 A.2d 604, 606 (1973). Recognizing that limitation on our review function, we proceed to a consideration of the merits.

III

Officers and directors of a corporation owe a fiduciary duty to the corporation and to its shareholders, which requires them to act in good faith in managing the affairs of the corporation. *See, e.g., United States v. Byrum*, 408 U.S. 125, 142 (1972); *SEC v. Chenery Corp.*, 318 U.S. 80, 85 (1943); *McKay v. Wahlenmaier*, 96 U.S.App.D.C. 313, 322, 226 F.2d 35, 44 (1955); *Johnson v. American General Insurance Co.*, 296 F. Supp. 802, 809 (D.D.C. 1969). Courts particularly scrutinize transactions between corporations with interlocking directorates, a situation in which two corporations have a majority of their boards of directors in common. Transactions resulting from actions of the common directors taken on behalf of both corporations must be deemed presumptively fraudulent. *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 599 (1921); *Corsicana National Bank v. Johnson*, 251 U.S. 68, 90 (1919); *Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp.*, 84 U.S.App.D.C. 275, 277-282, 173 F.2d 416, 418-423 (1949).

Similarly, promoters of a corporation stand in a fiduciary relation to both the corporation and its stockholders, which requires them to act with the utmost good faith and to disclose fully all material facts to both the corporation and its stockholders. *McCandless, Receiver*

v. Furlaud, 296 U.S. 140, 156-57 (1935) *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 203-04 (1900); *Post v. United States*, 132 U.S.App.D.C. 189, 198, 407 F.2d 319, 328 (1968), *cert. denied*, 393 U.S. 1092 (1969); *Bailes v. Colonial Press, Inc.*, 444 F.2d 1241, 1244 (5th Cir. 1971); *Earle R. Hanson & Associates v. Farmers Cooperative Creamery Co.*, 403 F.2d 65, 70 (8th Cir. 1968). The fiduciary concept is not limited to stock corporations but applies to membership organizations as well. *Post v. United States, supra*, 132 U.S.App.D.C. at 199, 407 F.2d at 329.

Like promoters or directors of a corporation, developers of a housing cooperative occupy a fiduciary position with respect to the individual members of the cooperative. The promoter of a cooperative apartment building must disclose completely the terms of the apartment sales and the extent of the financial obligation to be undertaken by the prospective apartment purchasers. *Northridge Cooperative Section No. 1 v. 32nd Avenue Construction Corporation*, 2 N.Y.2d 514, ——, 141 N.E. 2d 802, 808, 161 N.Y.S.2d 404, ——, (1957) (*Northridge*).

On December 6, 1974, when the various agreements between Associates and Cooperative were executed, the corporations shared a common majority of their boards of directors—defendants Laurins, Norman, and Baden. The trial court found that the promoter, defendant Laurins, dominated the boards of directors and that the other board members viewed themselves as employees of Laurin and had no concept of their roles as officers and directors of the respective corporate entities. Laurins prepared and executed the documents relating to the sale of the apartment building on behalf of both Cooperative and Associates. Defendants, as de-

velopers and directors of the cooperative, clearly owed fiduciary duties to its members.

The trial court found that those fiduciary duties commenced on December 1, 1974, the date on which it became clear that Laurins intended to sell his rights in the apartment building to Cooperative. Laurins testified that he recognized his fiduciary obligation as of December 6, 1974, the date on which Cooperative was incorporated and on which the various agreements between Associates and Cooperative were executed. Laurins and his codefendant Norman testified that they discharged their fiduciary obligations to Cooperative by "play-acting," a role-playing technique in which one defendant played the part of Cooperative and the other purported to represent the interests of Associates. The trial court, however, found that the play-acting "fail[ed] to rise to any acceptable level of performance of a fiduciary in behalf of his corporation" and characterized the play-acting as a means of determining just how far the developers could go. The trial court did not err in concluding that Associates failed to discharge its fiduciary duty to Cooperative.

IV

Appellants challenge the trial court's finding that defendants had not disclosed adequately the existence of two notes in favor of Associates totaling $105,700 and had not sustained the burden of showing the fairness of those transactions to Cooperative. As fiduciaries, defendants were required to disclose the extent of the financial undertakings to the members of Cooperative. *See Northridge, supra*, 2 N.Y.2d at ——, 141 N.E.2d at 808, 161 N.Y.S.2d at ——. The sales agreement signed by the members indicated that the total corporate indebtedness was limited to $945,000. Under the terms of the assignment of purchase agreement, Associates agreed

to advance any additional cash required by Cooperative to obtain title to the apartment building. The trial court found, however, that the existence of those two notes, which were signed by Laurins and attested to by Baden, was not disclosed adequately to prospective apartment purchasers. Therefore, it was not error to limit defendants' recovery on those notes to the amounts expended for closing and renovation expenses.[7]

Not only did the trial court find that defendants failed to disclose the existence of the two notes, but it also found that the terms of the notes had been significantly altered from those outlined in the assignment of purchase agreement to the detriment of Cooperative. The record amply supports those findings. The trial court's conclusion that the treatment of the notes constituted an overreaching was not erroneous.

V

Defendants also failed to disclose the substantial increase in Cooperative's maintenance fees anticipated after its first year of operation. Defendant Laurins testified that by March 1975, he was aware of the expected increase in fees for the following years, but he failed to notify prospective purchasers of the increase. Consequently, Cooperative members were misled by the maintenance figure appearing in the 1975 budget. Two items of non-recurring income improperly were included in the

[7] The trial court permitted a recovery in the amount of $30,700—$9,365.90 in closing costs and $21,334.10 in renovation expenses. The court did not err in refusing to reimburse Associates for the $75,000 down payment made to the Jawishes for the property. Although Associates agreed to make a cash down payment of $75,000 as part of the purchase price of $750,000 from the Jawishes, the total purchase price agreed upon for the sale from Associates to Cooperative was $945,000, not $945,000 plus the $75,000 cash down payment.

1975 maintenance budget: membership fees and first-year principal payments.[8] The trial court heard uncontradicted expert testimony that the inclusion of these items in income violated sound accounting principles. Additionally, the trial court found that the maintenance fee disclosure problem was exacerbated by the failure of defendant VAL Management Company to prepare the 1976 maintenance budget on time. The trial court concluded that in failing adequately to inform the cooperative members of the extent of their maintenance obligations, defendants breached their fiduciary duties to Cooperative. We find no error in that conclusion.

VI

Although courts properly are reluctant to interfere with the freedom to contract, it may become necessary to refuse to enforce contractual provisions which operate contrary to public policy. In particular, careful scrutiny must be given to contractual provisions in situations in which one of the contracting parties acts as a fiduciary to the other party. Contracts which tend to encourage promoters to disregard the best interests of the corporation must be invalidated.

The trial court invalidated four provisions of the deed of trust which it found to be unconscionable and violative of public policy. First, the court held that the paragraph of the deed of trust which held Associates harmless from attorneys' fees was unenforceable.[9] Such provi-

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[8] *See* note 4 and accompanying text, *supra*.

[9] That paragraph provided:

> Grantor shall save Beneficiary and Trustees harmless from all costs and expenses, including reasonable attorneys' fees, and costs of a title search, continuation of abstract and preparation of survey, incurred by reason

sions are common in deeds of trust in the District of Columbia. *See In re Wolman*, 314 F. Supp. 703, 705 (D.Md. 1970). These provisions generally are enforced in most jurisdictions, including this one. *Manchester Gardens, Inc. v. Great West Life Assurance Co.*, 92 U.S. App.D.C. 320, 325, 205 F.2d 872, 877 (1953). Courts do, however, have discretion to refuse to enforce such provisions in cases in which it would be inequitable to do so. In *Manchester Gardens*, the court stated:

> [W]here the merit or necessity of the creditor's claim or defense is successfully challenged, courts may decline to enforce attorney's fee provisions. * * * In no event should the sum allowed be so large as to amount to an undue penalty for taking one's grievance to the courts. [Id., at 326, 205 F.2d at 878 (footnote omitted).]

The trial court found that the challenged provision violated the general rule that each party is to bear its own costs of litigation. Although contracting parties gener-

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of any action, suit, proceeding, hearing, motion or application before any Court or administrative body in and to which Beneficiary or Trustees may be or become a party by reason of this Deed of Trust, including but not limited to condemnation, bankruptcy, and administration proceedings, as well as any other of the foregoing wherein proof of claims is by law required to be filed or in which it becomes necessary to defend or uphold the terms of this Deed of Trust, and all money paid or expended by Beneficiary or Trustees in that regard, together with interest thereon from day of such payment at the rate provided in the note, shall be secured hereby and, shall be payable by Grantor to Beneficiary or Trustees, as the case may be, within five (5) days after demand.

ally are free to agree that attorneys' fees will be borne by a particular party, this provision must be evaluated in light of the fiduciary duty which Associates owed to Cooperative. Normally, attorneys' fees provisions which are enforced by courts are those which indemnify the creditor for attorneys' fees and collection costs if the creditor must institute suit when the debtor defaults on his obligation. In this case, the debtor (Cooperative) sued the creditor (Associates) for breach of fiduciary duty. This particular attorneys' fees provision, negotiated by Laurins on behalf of both Cooperative and Associates, served to insulate Associates from suit by Cooperative based upon a breach of fiduciary duty. Not only did this provision have the potential to function as a weapon used by the fiduciary to discourage litigation, but in this case defendants actually invoked the provision and offset its attorneys' fees against rental payments which it owed to Cooperative.

Furthermore, the trial court concluded that the attorneys' fees provision was too broad because it required Cooperative to pay Associates' legal fees regardless of the outcome of any litigation. Such a provision is impermissibly broad in that it permits "a party who breaches a contract to rely on the same contract to reimburse it for expenses, such as attorney's fees, which arose out of the breach." *First Atlantic Building Corp. v. Neubauer Construction Co.*, 352 So.2d 103, 106 (Fla. Dist. Ct. App. 1977). Thus, we see no error in the trial court's conclusion that this contract clause, which served to foster and to insulate breaches of fiduciary duty by Associates, is illegal and void.

The trial court also voided the provision of the deed of trust which permitted Associates to accelerate the entire debt upon the sale or transfer of an apartment

unit.[10] This clause, commonly referred to as a "due-on-sale" clause, provided that any refinancing by the new purchaser with Associates be made at the highest prevailing legal rate of interest. The trial court found no legitimate justification for the overreaching provisions of the clause and concluded that it constituted an unreasonable restraint on alienation.

Although a due-on-sale clause may appear unexceptionable, it can severely restrict the mortgagor's ability to alienate his property freely. During inflationary periods, a purchaser's ability to assume the existing mortgage on a piece of property may determine whether he is willing and financially able to make the purchase. If he is forced to refinance the mortgage at a higher interest rate, the price that he is willing to pay for the property will decrease correspondingly. *See* Note, *Judi-*

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[10] That clause, in its entirety, stated:

> In the event of the sale, conveyance, or transfer of all or any part of the Premises by the Grantor, Beneficiary may accelerate the entire principal due on the Note. In the event of a sale, conveyance, or transfer of an interest in the Grantor which includes the right of possession to a part of the Premises, Beneficiary may accelerate that portion of the total indebtedness secured hereby which said owner of an interest in Grantor has secured by executing his promissory note to Grantor pursuant to the provisions of paragraph 27 herein. Beneficiary may at his sole option elect to refinance said portion of this indebtedness for the Grantor if the sale of said interest is made to a person whom the Beneficiary, in its sole judgment, believes to be financially capable of supporting the portion of the indebtedness he will be responsible for. Said refinancing may be made at the highest prevailing legal rate of interest. The primary responsibility of repaying the refinanced portion or portions of the total indebtedness secured by this Deed of Trust shall remain with Grantor.

cial Treatment of the Due-on-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability, 27 STAN. L. REV. 1109, 1113 (1975). This due-on-sale clause not only permitted the mortgagee to accelerate the debt upon transfer or sale of the property, but also mandated that the refinancing—available at the sole option of the mortgagee—be at the highest legal interest rate. Thus, the due-on-sale clause substantially impaired the mortgagor's ability to resell his property.

The quantum of restraint imposed on a mortgagor by a due-on-sale clause must be weighed against the mortgagee's legitimate interests in protecting his loan to determine whether the restraint is reasonable. *See generally*, Annot., 69 A.L.R.3d 713, 734 (1976). The mortgagee has a legitimate interest in protecting against the impairment of his security and the risk of default. When these interests are jeopardized by a change in ownership of the property, enforcement of a due-on-sale clause may be reasonable. *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 950-51, 582 P.2d 970, 975, 148 Cal. Rptr. 379, 384 (1978); *Tucker v. Lassen Savings and Loan Association*, 12 Cal.3d 629, 638-39, 526 P.2d 1169, 1175, 116 Cal.Rptr. 633, 639 (1974); *Nichols v. Ann Arbor Federal Savings & Loan Association*, 73 Mich.App. 163, ——, 250 N.W.2d 804, 807 (1977). At trial, Associates claimed that the due-on-sale clause was a necessary control device to prevent "undesirables" from entering the cooperative. The trial court did not err in concluding that this interest was protected adequately by admission procedures established by the by-laws and the rules and regulations of Cooperative.

Associates argues that the due-on-sale clause was necessary to protect its interest in maintaining its loan at current interest rates. A lender's desire to maintain its

loan at current interest rates is not sufficient justification for enforcement of a due-on-sale clause. *Wellenkamp v. Bank of America, supra*, 21 Cal.3d at 952, 582 P.2d at 976, 148 Cal.Rptr. at 385; *Tucker v. Lassen Savings and Loan Association, supra*, 12 Cal.3d at 639 n.10, 526 P.2d at 1175 n.10, 116 Cal.Rptr. at 639 n.10; *Nichols v. Ann Arbor Federal Savings & Loan Association, supra*, 73 Mich.App. at ——, 250 N.W.2d at 809. We find no legitimate interests of Associates which justify the restraint on alienation of the apartment units resulting from the inclusion of the due-on-sale clause in the deed of trust.

Defendant Laurins structured the clause in his best interests as the lender rather than in the best interests of Cooperative, with respect to which he was a fiduciary. The due-on-sale clause protected his interest as a lender in maximizing his income from the loan and ignored Cooperative's interest in preserving the marketability of apartment units. Although we do not reach the general validity of due-on-sale clauses in deeds of trust in the District of Columbia, we agree with the trial court that in light of the fiduciary duty owed by Associates to Cooperative, this particular clause constituted an overreaching by Associates and is void as an unreasonable restraint on the alienation of the apartment units.

The trial court also invalidated the paragraph of the deed of trust which provided that Cooperative could not prepay the participating financing without Associates' written consent.[11] Any attempt to prepay the underlying

[11] That paragraph provided:

> Grantor covenants and agrees not to exercise any right or privilege of prepayment of the Participating Financing and further covenants and agrees not to enter into any agreement with the holder of the Participating Financing

financing would accelerate the entire indebtedness. Associates argues that the clause was necessary to prevent Cooperative from refinancing the debt when interest rates fell and denying defendants the benefit of their bargain. This argument must be considered in conjunction with defendants' position on the due-on-sale clause.

On the one hand, the due-on-sale clause permitted Associates to take advantage of higher interest rates during times of inflation, while on the other hand, the prohibition against prepayment prevented Cooperative from refinancing its mortgage during times of lower interest rates. We conclude that this clause, like the due-on-sale clause, was included in the deed of trust without consideration of the best interests of Cooperative. The trial court did not err in finding that the prepayment clause

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modifying or amending any of the provisions dealing with payment of principal or interest thereunder without the prior written consent of the Beneficiary. In consideration of the financing provided by Beneficiary under the provisions of this Deed of Trust, Beneficiary is irrevocably constituted sole and exclusive agent and attorney in fact for Grantor to arrange, at Beneficiary's sole discretion to refinance any or all of the Participating Financing or debt due under the terms of this Deed of Trust if such action is desired by Beneficiary. Such agency shall include the authorization of Grantor for Beneficiary to execute on Grantor's behalf all documents required by any lender to accomplish said refinancing. In the event the Grantor shall not have the power to delegate to Beneficiary the performance of any act required to effect said refinancing, Grantor agrees to execute any documents and provide any such affidavits or representations required of a lender to effect said refinancing. Failure of Grantor to cooperate in all respects with the refinancing of the Participating Interests or debt due hereunder shall be deemed a default under the terms and provisions of this Deed of Trust.

was unenforceable because it unreasonably impaired the marketability of the apartment units.

Finally, the trial court refused to uphold that portion of the deed of trust which gave Associates the power to declare the $945,000 note due in full in ten days if the deed of trust were declared unenforceable by a court.[12] The court concluded that the provision "operated wholly to the benefit of the defendants at the time that they owed plaintiffs a duty of loyalty which included a prohibition against overreaching." Like the attorneys' fees clause, this paragraph deprived Cooperative of its right of redress in court for violations of the fiduciary duty owed by Associates to Cooperative. The court did not err in concluding that the provision was unenforceable.

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[12] That paragraph provided:

> Nothing herein contained nor any transaction related hereto shall be construed or shall so operate either presently or prospectively, (a) to require Grantor to pay interest at a rate greater than is now lawful in such case to contract for, but shall require payment of interest only to the extent of such lawful rate, or (b) to require Grantor to make any payment or do any act contrary to law; but if any clause and provision herein contained shall otherwise so operate to invalidate this Deed of Trust in whole or in part, then such clauses and provisions only shall be held for naught as though not herein contained and the remainder of this Deed of Trust shall remain operative and in full force and effect. If at any time any law or court decree prohibits the performance of any obligation undertaken herein by the Grantor, or provides that any amount to be paid by the Grantor must be credited against the Grantor's obligations under the Note, the Beneficiary will have the right, on ten (10) days prior notice to the Grantor, to require payment in full of the entire indebtedness secured hereby.

VII

The trial court found that Associates failed to perform two of its contractual duties: to convey the units to purchasers and to perform its apartment preparation duties. Title to the apartment units was assigned to Associates for the sole purpose of selling those units to the public. Associates pledged 11 mutual ownership contracts as collateral for the October 6, 1976, and January 1978 promissory notes in clear violation of the assignment agreement. We are unpersuaded by defendants' argument that their actions in pledging the mutual ownership contracts were necessitated by mounting legal fees in the suit brought by Cooperative. The record amply supports the trial court's conclusion that "since the instigation of this litigation, Associates has maintained the unsold units for every purpose *but* that which is specified by the agreement."

The trial court partially rescinded the assignment agreement between the two parties and ordered defendants to reconvey title to the 11 unsold units to Cooperative. Appellants claim that the proper remedy would have been to rescind the agreement completely by returning the building to Associates and by cancelling Cooperative's indebtedness. We conclude, however, that in light of the oppressive actions by defendants, the court did not abuse its discretion in fashioning an equitable remedy.

VIII

Appellants also challenge the award of attorneys' fees to Cooperative. Attorneys' fees generally are not awarded to either party in a lawsuit. The award of attorneys' fees is appropriate, however, "where a party brings or maintains an unfounded suit or withholds action to which the opposing party is patently entitled, as by virtue of a judgment or because of a fiduciary rela-

tionship, and does so in bad faith, vexatiously, wantonly, or for oppressive reasons." *1901 Wyoming Avenue Cooperative Association v. Lee*, D.C.App., 345 A.2d 456, 464-65 (1975); *accord, AFSCME v. Ball*, D.C.App.,—— A.2d —— (No. 80-1309, Dec. 30, 1981), *Diggs v. Stewart*, D.C. App., 418 A.2d 1069, 1071 n.7 (1980); *Bay General Industries, Inc. v. Johnson*, D.C.App., 418 A.2d 1050, 1057 n.20 (1980); *Trilon Plaza Co. v. Allstate Leasing Corp.*, D.C.App., 399 A.2d 34, 37 (1979); *Wisconsin Avenue Associates, Inc. v. 2720 Wisconsin Avenue Cooperative Association, Inc.*, D.C.App., 385 A.2d 20, 24 (1978); *F. W. Berens Sales Co. v. McKinney*, D.C.App., 310 A.2d 601, 602 (1973); *Continental Insurance Co. v. Lynham*, D.C.App., 293 A.2d 481, 483-84 (1972). After an examination of the voluminous record (nearly 5,000 pages) in this overlitigated case (the full history of which could not feasibly be set forth in this opinion), we conclude that the trial court did not abuse its discretion in awarding attorneys' fees to Cooperative.

IX

Appellant Gold Depository and Loan Company challenges the post-judgment issuance of an injunction barring the public sale of the 11 apartment units which it held as security for the October 6, 1976, and January 5, 1978, promissory notes which had been issued by Associates. GDLC claims that the prohibition on the sale of the remaining unsold apartment units did not apply to the lien which it held on the units. It argues that in foreclosing on the promissory notes (which were in default), it was not acting in concert with the defendants named in the injunction, but merely was protecting its own security interest.[13]

[13] Appellant GDLC asserts several other grounds of error which we find to be without merit.

The pledge of the 11 mutual ownership contracts as collateral for the promissory notes by Associates clearly contravened the purpose of the assignment agreement. *See* Part VII, *supra*. The promissory notes then were transferred to a series of Laurins-controlled entities. *See* Part I, *supra*. The trial court found that CIB (one of the last holders) was a continuation of CMI, a named defendant in the Superior Court litigation, through its sole general partner, Real Estate Equity Management. *See* notes 1 and 2, *supra*. CIB then transferred the promissory notes to GDLC, its wholly-owned subsidiary and another Laurins-controlled entity. Thus, the record supports the trial court's conclusion that GDLC, a wholly-owned subsidiary of a continuation of a named defendant, was in privity with defendant Laurins and, therefore, was bound by the court's order. The attempted foreclosure by GDLC was an effort by defendants to circumvent the court's order enjoining defendants and all parties in active concert from selling or leasing the apartments in question. The trial court did not err in prohibiting the public sale of the 11 units by GDLC.

X

Also challenged is the trial court's finding that defendant Laurins was in civil contempt of the court's final order for his refusal to turn over title to the 11 apartment units to Cooperative. However, Laurins purged himself of contempt by returning the mutual ownership contracts to Cooperative. On October 13, 1979, the trial court set aside the contempt order. The appeal of the contempt citation accordingly is moot. *Marshall v. Whittaker Corp., Berwick Forge & Fabricating Co.*, 610 F.2d 1141, 1145 (3d Cir. 1979); 15A CYCLOPEDIA OF FEDERAL PROCEDURE § 87.104 (3d ed. Supp. 1981).

XI

In summary, the trial court did not err in concluding that defendants breached their contractual and fiduciary duties. Accordingly, we affirm the trial court's rulings on liability and damages. We also affirm the issuance of an injunction barring the sale of apartment units by GDLC. The appeal of defendant Laurins' civil contempt citation is moot.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 2583-76
Civil I — Judge Stewart

2720 WISCONSIN AVENUE
COOPERATIVE ASSOCIATION, INC., *et al.*,
Plaintiffs,

v.

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Findings Of Fact And Conclusions Of Law

This is an action by a District of Columbia cooperative housing association and by individual plaintiffs who are members of the cooperative against certain individuals who were formerly officers and/or directors of plaintiff-cooperative and various entities controlled by these defendants, each of whom had dealings with the cooperative and its members. Such dealings cover the period of time in which the real property involved was acquired and sold to the cooperative, the promotion of the cooperative and the sale of certain of its units and also the management and control of the cooperative from its inception to the present date.

The Complaint (amended) is a multiple count pleading setting forth alleged causes of action for declaratory judgments, accounting, breach of contract, breach of fiduciary duty and unjust enrichment, injunctive relief and fraud and deceit. The defendants have denied the existence of any valid causes of action and filed multiple counterclaims seeking to recover for damages to reputation, for tortious interference with business

contracts, for debts due under two notes and for loss of profits and lastly for attorney's fees under terms of certain of the documents executed by the parties. The defendants also seek to recover damages against one of the individual plaintiffs for her alleged breach of employment contract and/or her negligent performance of her employment duties.

This litigation was commenced on the 18th day of March, 1976 and shortly thereafter the parties appeared before the court for a hearing on a perliminary injunction. Thereafter, the case was placed on a Civil-I calendar and assigned to the Honorable James Belson, who handled all matters thereafter arising until the 11th day of April, 1978, when the case was certified for trial to this court (order of Chief Judge Greene). The matters, pretrial, were numerous. The complexity of the litigation was such that Judge Belson, in an effort to assist the parties and counsel, made certain rulings, *in limine*.

On ther morning of the date of trial, April 17, 1978, the parties announced their withdrawal of a jury demand and the case then proceeded to trial as a non-jury trial. The trial consumed twelve days, in which the court heard testimony of thirty-five witnesses (three by deposition) and received in evidence over 1200 exhibits.

Obviously the withdrawal of the jury demand was in part an effort to cut down on the time required for trial (estimated at 5-6 weeks) and the same subject afforded the basis for the court ordering, pretrial, that the issues of liability and damages would be bifurcated. Consequently, with the first phase of the trial concluded and counsel now having had the opportunity to submit proposed Findings of Fact and Conclusions of Law, the court addresses the determination of issues of liability on the Complaint and Counterclaims.

The substantial majority of plaintiff-purchasers were well educated persons of means who were gainfully employed at the time of purchase. Of the 25 individual plaintiffs, only 3 have not had some college education or some formal education beyond high school and of those, Mrs. Bell and Mrs. Scott have had significant experience in real estate and/or financial matters.

A substantial number of the plaintiff-purchasers had other investments in real property at the time of purchase, including Mr. Coler, Mr. Hassan, Mr. Rogers and Mrs. Scott, who owned interests in other condominiums and/or cooperatives.

Some plaintiff-purchasers looked at condominiums in the area prior to purchase.

All plaintiff-purchasers visited the subject property at least once before signing their Cooperative Apartment Sales Agreements.

Some plaintiffs sought the advice of legal counsel in connection with their purchases.

The defendant Laurins is first a lawyer and also a shrewd and experienced businessman quite at home in negotiating and transacting business through multicorporation type transactions. Norman is a lawyer but his experience is no match for that of Laurins and though in certain areas it was obvious that he participated in discussions and even lent advice and was the author of the wrap-around deed of trust, his role was minor to that of Laurins. The remaining individual defendants were employees of Laurins who recognized that to be their status and obviously had no concept of their functions as officers and/or members of the Board of Directors of the corporate entities involved in dealings with or on behalf of a cooperative.

Just prior to trial, the parties, through their counsel, agreed upon and executed a "Joint Statement of Undisputed Facts"

which is marked as Exhibit-A to this memorandum opinion and attached hereto as a part of same.

At several stages prior to trial, the Honorable James Belson entered *in limine* rulings. Such rulings are marked as Exhibits B and C and are attached. This court treats these as if the law of the case and thus proposes to follow the same with a single exception and that being in the instance of the treatment of the elements of and defense to the tort of interference with the contractual rights of the defendants as asserted in one of the counterclaims. As to that claim, this court is of the view that a more recent decision of the District of Columbia Court of Appeals clarified the law and permits plaintiffs, in opposing the counterclaim, to assert that the actions taken were justified and/or privileged.

On November 13, 1976, A.V. Laurins & Co., Inc. executed a sales contract to purchase the building 2720 Wisconsin Avenue with the record title holders, Marjorie J. and Henry Jawish. At the time of the purchase, Laurins was contemplating several possibilities, primarily a cooperative but also the possibility of a nursing home or even the sale of the contract. However, his purpose and intent became clear on December 1, 1974 and within five days thereafter settlement proceedings were held and numerous documents were executed.

On December 6, 1974, 2720 Wisconsin Avenue Cooperative Association, Inc. (hereinafter Cooperative) and Wisconsin Avenue Associates, Inc. (hereinafter Associates) signed a document captioned "Assignment of Purchase Agreement" to 2720 Wisconsin Avenue, N.W. By this instrument Associates assigned to Cooperative its right to obtain fee simple title in the property in exchange for Cooperative executing a wrap-around mortgage in the amount of $945,000.00 secured by the property in favor of Associates. Additional terms provided that Associates should advance all cash required by Cooperative to enable

it to acquire title to the property and it was to be repaid over a 23-year period at a delineated interest rate.

The defendants caused Cooperative to execute a note and deed of trust in favor of defendant Wisconsin Avenue Associates, Inc. in the amount of $945,000.00. This deed of trust is a "wrap-around" instrument under which defendant Associates, or its assignee, collects mortgage payments, keeps a percentage for itself and forwards the remainder to the beneficiaries of the three pre-existing deeds of trust. In addition to certain other provisions of the $945,000.00 deed of trust which the plaintiffs claim are oppressive, a provision requires Cooperative to obtain the personal liability of each person who becomes a member of Cooperative with respect to the *pro-rata* or percentage share of the $945,000.00 note allocable to each person's interest.

Cooperative and Associates entered into a written agreement, drafted by the defendant Norman and signed on behalf of Cooperative by the defendant Laurins, to assign to Associates 100% of all the membership interests in Cooperative for the sole purpose of Associates selling membership interests to individual purchasers. This transfer agreement, defendants' Exhibit-11, also provides that Associates, not Cooperative, shall be totally responsible for all costs involved in promoting the venture.

In conjunction with this, Cooperative and Associates then entered into a Mutual Ownership Contract for each apartment unit in the building (49 units). The agreement gave Associates the ability to transfer by way of sale or lease-option the right to perpetual use and enjoyment of the individual apartments to members of the public.

At the time of settlement on December 6, 1974, the documents executed included four settlement sheets: 1) defendants' Exhibit-13, settlement for 2720 Wisconsin Avenue Cooperative Association; 2) defense Exhibit-14, settlement sheet for

Marjory D. Jawish and Henry Jawish; 3) defense Exhibit-15, settlement sheet for A. V. Laurins & Co., Inc.; 4) defense Exhibit-16, settlement sheet for Wisconsin Avenue Associates.

The purchase price of the property upon which Laurins and the Jawishes agreed was $750,000.00 but in the transfer of title from the Jawishes directly to the cooperative, the latter was caused to execute a wrap-around deed of trust in the amount of $945,000.00 and thus the promoter-developer immediately had a paper profit of $195,000.00. At the time of the agreement to purchase, there were two existent deeds of trust on this property and as part of the purchase contract the sellers agreed to take a third trust and thus, at the time of the acquisition of the property by Cooperative, there were three deeds of trust totalling $675,000.00. The difference between the aggregate amount of these trusts and the purchase price consisted of $75,000.00 paid by Laurins in toto as of the time of settlement on December 6, 1974.

Though the evidence reflects that the property was evaluated by Laurins himself as having only a value of $550,000.00 prior to his purchase for $750,000.00, it is obvious that this evaluation was based upon the use of the building as one of apartment rentals. Reasonable projections for use as a cooperative after the conversion demonstrated a value of $1,300,000.00 or more. The plaintiffs attack at the outset the cost of acquisition of this building to the cooperative but offer no evidence of any substance to support a claim that the building was over-priced to Cooperative and in fact, the evidence which the court accepts, as offered by the defendants, clearly demonstrates the worth of the purchase price. The principal evidence upon which the plaintiffs rely in their questioning of the value of this building is in fact predicated upon the existence of restrictive clauses contained in the wrap-around deed of trust executed by Cooperative. Those specific clauses will be treated hereinafter Suffice it to say that the purchase price of $945,000.00 is supported by

the defendants' evidence even where scrutinized under the defendants' obligations to deal fairly with Cooperative.

On December 6, 1974, Laurins and his associates and employees were the officers and members of the Board of Directors of the several corporations involved in these transactions, including Cooperative. There is no question but that in the accomplishment of certain acts and the execution of documents that they were obliged individually and collectively to Cooperative and to the members of the public who would subsequently purchase units to disclose their dealings, the existence of possible conflicts because of their status and to act in a manner which would constitute fair dealing.

It is a well settled principle of corporate law that promoters are fiduciaries of a yet to be formed corporation, just as officers and directors are of their corporation. See *McCandless* v. *Furland*, 296 U.S. 140, 56 S.Ct. 41 (1935); *Post* v. *U.S.*, 132 U.S.App.D.C. 189, 407 F.2d 319 (1968).

Thus, the first crucial factual determination for the court to resolve is at what point did the defendants become cloaked with their fiduciary responsibilities. The right to purchase the building at 2720 Wisconsin Avenue arose in part from a sales contract dated November 13, 1974 and entered into by the prior legal record title holders, Marjory J. and Henry Jawish and A. V. Laurins & Co., Inc. A. V. Laurins & Co., Inc., as contract purchaser, was acting on behalf of both 2720 Limited Partnership and Associates. The next significant date is December 6, 1974, when Associates assigned its right to purchase the property to Cooperative, pursuant to written agreements. It was also at this time that Cooperative purchased the building in exchange for executing a wrap-around deed of trust note to Associates in the amount of $945,000.00, as well as an agreement to assign to Associates all right, title and ownership to the Mutual Ownership Contracts for the purpose of Associates selling those contracts to members of the public. Furthermore,

it was on December 6, 1974 that the Articles of Incorporation for Cooperative were accepted by the District of Columbia, which articles designated the defendants Laurins, Norman, Baden, Thompkins and Chasen as the initial Board of Directors.

The plaintiffs urge the court to find that the fiduciary duty arose as early as the signing of the contract for sale on November 13, 1974, or in the alternative, certainly before December 6, 1974. On the other hand, the defendant Laurins testified that he recognized his fiduciary obligations as of December 6, 1974, but no earlier. The court finds and so holds that the defendants' fiduciary duties commenced on December 1, 1974 when 2720 Limited Partnership (an entity owned or controlled by the defendant Laurins) agreed to purchase the $945,000.00 note to be executed by the yet-to-be formed cooperative in favor of Associates. In so doing, the court is following the reasoning of *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 203 Mass. 159, 89 N.E. 193 (1909), which limits the time of disclosure to a point at which the promoter made some overt act relating to the formulation of the corporation in order to be charged as a fiduciary. The court accepts the testimony of Laurins that he considered the option of converting the building to a nursing home or other use. Clearly, if the right offer came along, he could have just sold his rights in the building. On December 1, 1974, his intentions to convert 2720 to a cooperative form of housing were manifest and the overt act necessary to initiate his fiduciary responsibility had occurred.

In accepting the temporal analysis of the commencement of the fiduciary relationship, the court is not unmindful of the risk theory also postulated by the plaintiffs. See *Measure of Recovery Against Promoter Who Sells Property to a Corporation in Breach of Fiduciary Duty*, 1939-1940, U. Chi. L.Rev. 534, at 541-542. This analysis involves an evaluation of the risks the promoter took in selling the property to the corporation. The

plaintiffs argue that Laurins assumed no risk and therefore is entitled to no benefit. It is true that Laurins' utilization of the corporate form has minimized his likelihood of incurring personal liability. However, this simply does not mean that there has been absolutely no risk both to Laurins and his various entities involved in this transaction. Indeed, this method inured partially to the benefit of Cooperative because transfer of title directly to Cooperative served to avoid duplicate transfer tax expenses.

With the establishment of the duty as of December 1, 1974, the next questions are to whom is the duty owed and what is the extent of the obligation.

The defendants have somewhat half-heartedly raised the issue that the individual plaintiffs lack standing to pray for relief of a fiduciary breach, the contention being that Cooperative is the only proper party. The court has dealt with this question in its *in limine* ruling of October 27, 1977. In its answer to Question #8, the court found that there was a duty of disclosure owed to individual plaintiffs. Similarly, in Question #19, the court determined that a finding of violation of a duty may be based upon acts performed prior to a particular plaintiff's purchase. See 85 A.L.R. 1262. In its order dated October 8, 1976, the court stated:

> "Though defendants initially controlled Cooperative, undisputed facts appear to preclude a finding that their holding of 100% of the membership interests negated the existence of any fiduciary duty toward future shareholders. The Mutual Ownership Contract states that the membership of Wisconsin Avenue Associates was 'only for convenience of the transfer of this mutual ownership contract to an owner for occupancy by way of sale or lease option.' It does not appear that Associates actually purchased the units."

Since the duty is owed to all members of Cooperative, what then is the extent of that duty as a matter of law? The court holds

that what is essential in a cooperative apartment sales transaction of this kind is for the promoter/fiduciary to advise purchasers of the financial obligation they are undertaking in their purchase agreement. *Northridge Cooperative Section No. 1* v. *32nd Avenue Construction Corporation*, 2 N.Y.2d 514, 141 N.E.2d 802, 161 N.Y.S.2d 404 (1957). The plaintiffs have in effect asked the court to hold that individuals who purchase an apartment building are required to tell prospective apartment purchasers not only what they paid but also the total profit they expect to reap from it. The court is of the view that this may well be the result of some future legislation but that it is not the dictates of current law.

The construction and applicability of the District of Columbia Cooperative Association Act, D.C. Code 1973 § 29-801 *et seq.* has been the subject of *in limine* rulings by the court. Specifically, the legal significance of the 5% limitation on "promotion expense" imposed by § 29-838 has been partially treated therein. After further evaluation, the court has not been able to find any reported judicial opinions which construe or apply § 29-838 nor have the parties pointed to any. The legislative history of the Act is unenlightening.[1]

It is clear to the court that Congress did not draft the D.C. Cooperative Association Act with housing cooperatives in mind but rather contemplated the formation of other types of consumer cooperatives under the Act. The proscriptions imposed by § 29-838 therefore do not apply and the court finds as a matter of fact that no portion of Cooperative's $945,000.00

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[1] S. Rep. No. 1637, 76th Congr., 3d Sess. (1940); H.R. Rep. No. 2411, 76th Congr., 3d Sess. (1940); Hearings before a subcommittee of the Committee on the District of Columbia on S. 2013, 76th Congr., 3d Sess. (April 16, 18 & 19, 1940); 86th Congr. Rec. 7082-86 (May 29, 1940) (Senate debate); 86th Congr. Rec. 7863-73 (June 10, 1940) (House debate). There is only one reference to the relevant section of the Act in all of the legislative history. Hearings, supra, at 20 (statement of James E. Curry, April 16, 1970).

indebtedness was incurred as a promotion expense.[2] The law entitles the cooperative shareholder to protection from actual fraud and entitles him to disclosure of the obligations he assumes. *Northridge, i.d.*. Therefore, the court believes that the crux of this case is the adequacy of the disclosure by the defendants of the obligations assumed by the plaintiffs.

The court finds as a matter of fact and law that the disclosure of the $945,000.00 indebtedness of Cooperative was sufficient. Each and every plaintiff signed a cooperative apartment sales agreement which not only made specific reference to an assumption of corporate indebtedness in the amount of $945,000.00 but also affirmatively asserted that they had had an opportunity to read and expressly stated they understood the documents referred to, including the $945,000.00 note. This amount is further reflected in the various settlement sheets executed on December 6, 1974. Additionally, each of the plaintiffs signed individual notes which constituted a pro rata share of the total $945,000.00 indebtedness.

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[2] Ordinarily, "promotion" of a business corporation consists of discovering the business opportunity; investigating its economic feasibility; assembling the necessary personnel, property and money and incorporating the venture. 1 Fletcher, *Cyclopedia of Corporations*, § 189; Henn, *Handbook on the Law of Corporations* § 102 (2d.Ed. 1970). "In a comprehensive sense 'promoter' includes those who undertake to form a corporation and to procure for it the rights, instrumentalities and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business." *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 203 Mass. 159, 177, 89 N.E. 193 (1909). In light of § 29-838, however, "promotion" of a housing cooperative cannot be considered to be such a comprehensive activity. If the acquisition of capital assets were part of the "promotion" of a housing cooperative, then "promotion expenses" would include the costs of acquiring or constructing the common dwelling and the five per cent limitation of § 29-838 would apply. This would lead to an intolerable result. No housing cooperative could be organized under the D.C. Cooperative Associations Act because § 29-838 would effectively stand as a bar to acquiring the most expensive and principal asset of the cooperative, the common dwelling itself.

It is appropriate to note at this juncture that a good deal of the trial testimony concerned a dispute over just which documents were or were not made available to plaintiff purchasers. In general, the majority of the individual plaintiffs claim to have never seen a copy of the Deed of Trust or balance sheet and those few who requested the same claim to have been denied them or at least their delivery was delayed for some reason proffered by the defendants. At the outset the defendants strenuously objected to this line of testimony on the basis of the parol evidence rule. The defendants reiterated that each plaintiff had signed a contract which stated they had had an opportunity to read all of the documents and further point out that most were well educated, had previous experience with real estate contracts, etc., as noted above. There is no question that the law holds that one who signs a contract has a duty to read it and is obligated according to its terms. *Hollywood Credit Clothing Co.* v. *Gibson*, 188 A.2d 348 (D.C.App., 1963). However, the court was of the view that in light of the allegations of fraud in this case, as well as breach of fiduciary duty, where disclosure is a crucial element, that the plaintiffs' testimony should be received. In light of this ruling, the defendants put on evidence which asserted that all of these documents were made available to prospective purchasers and that their sales personnel were under explicit instructions to affirmatively respond to requests for any of the documents. The court is of the opinion that it is not necessary to make a specific finding of fact as to which particular document was or was not made available to each individual plaintiff. Rather, it suffices to find that with regard to the $945,000.00 indebtedness, there was adequate and sufficient disclosure.

In ruling on cross-motions for summary judgment, the court decided that plaintiffs' claims of loss would be measured against the market value of what they received, i.e., the membership interests in Cooperative, the apartment building and the grounds deeded to Cooperative. *Old Dominion Copper &*

Smelting Co. v. *Bigelow*, 188 Mass. 315, 74 N.E. 653 (1905). Therefore, while this stage of the proceeding concerned only the issue of liability, the court made it known to the parties that the proof that the defendants breached their fiduciary duty was contingent upon the plaintiffs' showing that they did not receive value. *Sankin* v. *5410 Connecticut Ave. Corp.*, 281 F.Supp. 524, 547, 564-67 (D.D.C.); aff'd. *per curiam sub nom.*, *Benn* v. *Sankin*, 133 U.S.App.D.C. 261, 410 F.2d 1060 (1969).

As stated previously, the plaintiffs attack at the outset the cost of the acquisition of this building to Cooperative and include in their complaint the contention that the defendants have reaped excess profits by reason of a so-called interest bulge. This assertion is predicated upon a showing that the interest obligation under the pre-existing trusts, underlying the wrap-around mortgage amounts to 6.8% whereas the wrap-around mortgage requires payment of 8%. The evidence adduced satisfied the court that under the totality of the circumstances an 8% interest rate was fair and reasonable. Though the court recognizes the difference in interest rates constitutes a profit to the defendants, it is part of the previously found reasonable cost to Cooperative ($945,000.00 at 8%) of the property. Thus again this court concludes the initial transaction, tested by requirements of law, fell within reasonable business dealings and was fair to Cooperative.

Since the property was acquired before the defendant/promoter stood in a fiduciary relationship to Cooperative, Cooperative may only recover his secret profits in excess of the fair market value of the property at the time of transfer. 7, U.Chi. L.Rev. 534 (1940), Henn, *Handbook of the Law of Corporations*, § 104 (1970). The court finds no such excess profits with regard to the $945,000.00 indebtedness. It is also pertinent to note that the 8% interest rate was a favorable rate in the market at that time.

However, the $945,000.00 Deed of Trust note was not the only obligation incurred by Cooperative. On December 16, 1974 Cooperative executed a note in favor of Associates in the amount of $100,000.00 and on September 1, 1975 Cooperative executed a note in favor of Associates in the amount of $5,700.00. The court finds that as far as these notes are concerned, the defendants have neither fully disclosed their existence nor sustained their burden of showing the fairness of the transaction.

It is well settled in the District of Columbia that transactions which are the product of interlocking relationships raise the rebuttable presumption of impropriety and will be carefully scrutinized by the court. *Mayflower Hotel Stockholders Protective Comm.* v. *Mayflower Hotel Corp.*, 84 U.S.App.D.C. 275, 173 F.2d 416 (1956). The burden is upon the defendants to show these transactions were fair. Indeed, this is so where there is only one director common to both Boards. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 599, 41 S.Ct. 209, 212 (1921). In the instant case, the undisputed facts reveal that the original members of the Board of Directors of Cooperative were the defendants Laurins, Norman, Baden, Chasen and Thompkins and the original members of the Board of Directors for Associates were Laurins, Norman and Baden. Both the $100,000.00 note and the $5,700.00 note are signed by Laurins and attested to by Baden. In *Corsicana Natl. Bank* v. *Johnson*, 251 U.S. 68, 40 S.Ct. 82 (1919), the Supreme Court stated:

> "That two corporations have a majority or even the whole membership of their boards of directors in common does not necessarily render transactions between them void; but transactions resulting from the same agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent unless expressly authorized or ratified by the stockholders. 251 U.S. 68, 90, 40 S.Ct. 82, 91."

The court's previous description of the individual defendants as mere employees of Laurins is significant in this context. The members of the Board of Directors of the defendants herein did not possess among themselves a divergence of interests which could be said to provide a minimal inhibition on the course of action that Cooperative would take respecting incurring additional indebtedness.

Initially, the defendants asserted that the directorate interlock was obvious to prospective purchasers. The members of the Board of Directors were in the respective articles of incorporation and accessible to the public. Also, the administrative offices of Associates and Cooperative were at one and the same place, but as most of the plaintiffs testified, it simply did not register that the developer and the president of Cooperative might have a duality of interests. It is no defense to say that the evidence existed in public documentation, i.e., the Articles of Incorporation. See *Clearview Gordens* v. *Weisman*, N.Y.L.J., August 26, 1957 (N.Y.Sup.Ct., 1957).

The defendants next asserted that they have adequately disclosed the existence of the $100,000.00 obligation. The origin of this note is best described in a three-step process. Firstly, in an Assignment of Purchase Agreement dated December 6, 1974, Associates agreed to advance all cash required by Cooperative and the terms of the loan were delineated therein. Next, the note itself, which is dated ten days later, December 16, 1974, depicts Cooperative's additional obligation but the terms of the loan are now somewhat different. The chart below graphically shows the differences.

Agreement (D's 10) 12/6/74	**$100,000.00 Note (D's 29)**
8.5% interest	8.0% interest
Interest to accrue from 12/6/74	Interest to accrue from 12/16/74
No interest payable first year	No interest payable first year
Interest only payable second year	No interest payable second year

Principal and interest third year	Interest only payable third year
Principal and interest payable for 4-23 years	Principal and interest payable 4-13 years

Thirdly, an obligation of Cooperative is alluded to in a *footnote* to the 1974-75 budget. The defendants assert that all of the plaintiffs received a copy of the budget and that this constitutes a full disclosure of the outstanding indebtedness. However, the loan referred to in this document is only for the amount of $84,366.00 and there is no specified interest rate. Even if the individual plaintiffs had been fully cognizant of this footnote they could not have determined the extent of the obligation assumed. Furthermore, it would have been logical for the purchaser to assume that the $100,000.00 was included in his purchase price because the Cooperative Sales Agreement spoke of "*the* corporate indebtedness (as evidenced by a Deed of Trust dated December 6, 1974 in the amount of $945,000.00)," and in terms of a "total price" and "total monthly payment." The court thus finds as a matter of fact and law, that the disclosure of the $100,000.00 note was not sufficient. The court further finds that the negotiation of said note evidences a breach of fiduciary duty on the part of the defendants. As depicted above, the terms of the note have been significantly altered to the detriment of Cooperative. The payout has been reduced from 23 years to 13 years, with a drastic balloon payment due at the end of 13 years. The transaction, negotiated by Laurins as President of Cooperative and Norman as President of Associates does not withstand the close scrutiny of the law. *Mayflower, supra*. The terms of the note do not reflect, nor does the defendants' evidence demonstrate that Cooperative's interests were represented in this transaction. The methodology of fulfilling his fiduciary responsibilities, as described by Laurins, was to interact with Norman through "play acting." Each would assume the role of one of the parties and then think through the various alternatives. But, as Mr. Justice Branddeis wrote in 1914, in *Other People's Money*:"

> "The practice of interlocking directorates is the root of many evils . . . It tends to disloyalty and the fundamental notion that no man can serve two masters."

Indeed, Laurins admits that at times in these mini-dramas, he would assume the role of the developer. Although the $100,000.00 note was executed on December 16, 1974, the money was not immediately credited to the account of Cooperative where it could accrue interest before drawing down on the funds. Norman agreed in trial this was not in the best interests of Cooperative. The court finds that this play-acting fails to rise to any acceptable level of performance of a fiduciary in behalf of his corporation. Rather, the scenario, ten days after the consummation of the deal on December 6, 1974, was not what *should* be done but how far *could* the developers go. Thus, the $100,000.00 note was not only not fully disclosed but constituted an over-reaching. The court holds that Cooperative will be obligated on this note to Associates only to the extent of its legitimate closing costs, as reflected on their settlement sheet.

There has been considerably less evidence proffered as to the $5,700.00 note executed on September 1, 1975. However, as to this transaction, the court similarly finds that the defendants have not fulfilled their duty to disclose this obligation assumed by the plaintiff purchasers. The note apparently was utilized to facilitate repairs to the roof of the building. Cooperative will therefore be liable only to the extent that it received value for this note, evidence of which will be considered in the damages segment of this trial.

There is yet another aspect, of the 1975 maintenance budget mentioned above, that involves a failure to fully disclose the obligation assumed. Two items of non-recurring income were included in this budget: $9,200.00 in membership fees and $6,900.00 in first year payment of principal; items which total $16,100.00 and reduce the total budget from $59,150.00 to $43,050.00. This meant that the 1976 maintenance budget in 1976 had to go up 37%, exclusive of normal rises due to inflation. The defendants contend that the fact that the items were included in the budget, which in turn was purportedly available to all purchasers, was a sufficient disclosure. In other words, anyone looking at the budget should have known it had to go up that amount. However, the items are innocuously listed under the

caption "Estimated Income Items" and not depicted as non-recurring. The court also had uncontradicted expert testimony that the inclusion of these items violated sound accounting principles. It is not obvious to the court, nor was it to the plaintiffs, the impact which the inclusion of these items would have on the following year's budget. "The duty of disclosure is not performed by the making of a statement which does not disclose the facts but merely contains something, which, if followed up by further investigation, will enable the inquirer to ascertain the facts, but does not point to them." Fletcher, *Cyclopedia of Corporations*, Vol. 1, § 194 (1974).

The maintenance fee situation was further compounded by the fact that on January 1, 1975, Cooperative entered into a property management contract with VAL Management Co., Inc. VAL is another company owned or controlled by defendant Laurins (its name being his initials scrambled) and thus again the transaction is subject to close scrutiny, *Mayflower, supra*. The decision to retain VAL, plausible on its face, was based on Laurins' previously unseccessful experiences with out-of-house management companies. One of VAL's primary contractual duties was to prepare by October 1, 1975 the budget for the coming year. However, the budget was not presented to Cooperative until January 16, 1976 and then it was in the form of a notice of increase in fees. By October 1, 1975, only 18 of the 39 units now sold had gone to settlement. Laurins explained that VAL's failure to prepare the budget timely was the product of "everyone" being too busy. The court finds this explanation unacceptable. The fact is that "everyone" is the same and the excuse offered simply shows they spread themselves too thin. VAL's failure to perform was a material breach of its contract. Furthermore, Laurins' own knowledge strikes right at the heart of the disclosure issue. It makes no difference that the defendants, through Ms. de Rochefort, made no promises that the fees would not increase, or that only a few of the plaintiffs inquired about the fees and utility rates. What is significant is that Laurins, as President of Cooperative, knew early on that the fees would perforce substantially increase. The minutes of the Board of Directors dated January 15, 1975 recount a discussion of the non-recurring items; Laurins testified that he knew as early as March, 1975 the fees would increase by approximately

$20-$30 and that he told Mr. Crane, a plaintiff, who was then an employee, of that fact; and Laurins must also be held to recognize that the plaintiff purchasers were indeed not reading all of the documents but were instead primarily concerned with their monthly costs. The court finds that Laurins' failure to disclose this information constitutes a breach of his fiduciary duty owned to Cooperative.

The plaintiffs have argued with some degree of persuasion that several of the provisions of the Deed of Trust are oppressive and contrary to public policy and were not negotiated in good faith by the defendant Laurins acting in his capacity as President of the fledgling corporation.

Paragraph 11, of the Deed of Trust, provides that Cooperative will hold Associates harmless from any costs or attorneys' fees incurred for any reason and without regard to the outcome of the litigation. Paragraph 11 states in its entirety:

> Grantor shall save Beneficiary and Trustees harmless from all costs and expenses, including reasonable attorney's fees and costs of a title search, continuation of abstract and preparation of survey, incurred by reason of any action, suit, proceeding, hearing, motion or application before any court or administrative body in and to which Beneficiary or Trustees may be or become a party by reason of this Deed of Trust, including but not limited to condemnation, bankruptcy, and administration proceedings, as well as any other of the foregoing wherein proof of claims is by law required to be filed or in which it becomes necessary to defend or uphold the terms of the Deed of Trust, and all money paid or expended by Beneficiary or Trustees in that regard, together with interest thereon from day of such payment at the rate provided in the note, shall be secured hereby and shall be payable by Grantor to Beneficiary or Trustees, as the case may be, within five (5) days after demand.

In the "play-acting" discussion of this provision, Norman, the President of Associates and also a director of Cooperative, testified that he raised a question as to its reasonableness and he and Laurins concluded that it was a reasonable provision. Laurins testified that all lenders insist upon such a provision in order to avoid "nuisance claims." He stated that the intent was to make sure there was an 8% interest "net" recoverable at all times.

The court finds that this particular provision violates the general American rule that in litigation, each party shall bear its own costs. Instead, it operates to penalize the Cooperative for taking any legal action in the form of an attack on the Deed of Trust even and especially a successful one since Cooperative must pay legal fees of Associates even if Cooperative prevails in the court action. The court has found no case which has ever upheld such a provision and is confident that none exists. Normal attorneys' fee provisions exist in foreclosure clauses and in brokerage contracts and are triggered only if the lender or broker prevails in court. This provision has gone far beyond established norms and as such is unconscionable and violative of public policy and is therefore void. If the provision were to be rigidly enforced, it would effectively close the court house doors. Additionally, and in the alternative, it is void as an equitable matter because in negotiating this provision, Laurins did not act fairly toward Cooperative to whom he owed a fiduciary duty of loyalty and honest dealing.

Paragraph 17 of the Deed of Trust provides that a purchaser has no right of resale of his unit; that upon an attempt to do so, his entire debt is accelerated; and that any new purchaser must deal with defendant Associates to finance the acquisition of the interest at the highest acceptable interest rate. At trial, Laurins testified that when he discussed this provision with Norman there was no conflict between them concerning it. He said it was considered a good control mechanism and that it protected against undesirable entering Cooperative at a later date. This reason is not a valid rationale for the inclusion of this provision in the Deed of Trust since protection against undesirables is governed by established admissions procedures set forth in the By-laws and Rules and Regulations of Cooperative. In addition, the borrower, in this case Cooperative, has the incentive not to include undesirables as they create a risk to Cooperative and its members affecting its continuing ability to service the corporate debt. The court further accepts the expert testimony proffered by the plaintiffs that this provision unnecessarily restrains the alienability of the units, detrimentally affecting the market value of the individual units and the building. See also *Mortgages — Due on Sale Clause: Restraint on Alienation — Enforceability*, 28 Case Western Res. L.Rev., 493

(1978); *Judicial Treatment of the Due on Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability*, 27 Stan.L.Rev. 1109 (1975). Typically, the lender is not involved in the resale of units since his security is the entire building. In the case of resale of individual interests in Cooperative, the obligation on Cooperative's note — that is the corporate debt — remains unchanged, even if the membership is changed. The member's right to resell his interest in no way affects the corporation's indebtedness to Associates. This right of resale by the member is not a resale of the building, a refinancing of the corporate debt or a transfer of title on the real estate. Since these are not affected, no valid reason justifies the overreaching provisions of paragraph 17. Laurins, as President and a fiduciary of Cooperative, violated his duties of loyalty to Cooperative in negotiating paragraph 17 of this Deed of Trust. Therefore, on the basis of this violation and because the due-on-sale clause constitutes an unreasonable restraint on alienation, see *Nichols* v. *Ann Arbor Federal Svgs. & Ln. Ass'n.*, 73 Mich.App. 163, 250 N.W.2d 804, *Tucker* v. *Lassen Svgs. & Ln. Ass'n.*, 12 Cal.2d 629, 526 P.2d 1169, 116 Cal.Rptr. 633 (1974), paragraph 17 is unenforceable.

Paragraph 34 of the Deed of Trust provides that members of Cooperative cannot prepay on participating financing without the written consent of the defendants and grants to the defendants the right to renegotiate the financing on the building. Any failure by Cooperative to cooperate in this regard is treated as a default which would immediately accelerate the entire debt. Laurins testified that as a fiduciary he asked Norman how this provision would affect Cooperative in future actions and it was decided it would benefit Cooperative in future actions and its members. Laurins' justification for this provision was that it barred unsophisticated owners who might do something silly and prepay the underlying first, second and third mortgages. He stated that this was a very important proviso for the lender. The court accepts the concession of the defendants at trial and rules that prepayment is permitted by virtue of the provisions of the individual collateral notes. The court alternatively holds that the individual notes, regardless of the concession of the defendants, constituted written permission to prepay. Thus, the court holds that the plaintiffs are not and cannot be subject to any dual liability. The

court also finds that paragraph 34 severely and unreasonably impairs the marketability of any unit interest in Cooperative and is therefore unenforceable.

Paragraph 46 of the Deed of Trust provides that the $945,000.00 Deed of Trust note is due and payable at the option of Associates ten days after an adjudication by a court of law that the Deed of Trust is unforceable or null and void. This paragraph was the focus of the longest discussion that Laurins and Norman had, the resolution of which was that it was a reasonable attempt to protect the lender in case a court of law decides the Deed of Trust is illegal. The court finds that paragraph 46, like paragraph 34, severly impairs the marketability of members' interests in Cooperative because of the onerous and one-sided nature of its provisions. In short, this paragraph deprives Cooperative and its members of their right of redress in the courts for resolution of issues arising out of their relationship with the defendants. Under paragraph 46, if Cooperative or its members should prevail in this action, defendants retain the right to call the $945,000.00 Deed of Trust Note. No judicial authority can uphold such a provision.

While Mr. Laurins conceded that this provision of the Deed of Trust could be scrutinized and interpreted, the court concludes that the negotiation of such a provision operated wholly to the benefit of the defendants at the time that they owed plaintiffs a duty of loyalty which included a prohibition against overreaching. This duty and its attendant obligation having been breached, paragraph 46 is void as a matter of law. Although holding certain portions of the Deed of Trust void or unenforceable, this court, as a court of equity, need not void the entire document. Thus the court finds the total instrument otherwise valid.

This court has previously held in its *in limine* rulings that defendant Associates did not exist within the meaning of the Business Corporations Act of the District of Columbia in December of 1974 since its Certificate of Incorporation was not issued until the 6th of January, 1975. *Robertson* v. *Levy*, 197 A.2d 443 (DCCA, 1964). Plaintiffs have urged that since Associates did not exist as a corporation at the time of executing the Deed of Trust, the Assignment Agreement and the $100,000.00 promissory note, each is void. Defendants have

countered that following its formal incorporation, Associates adopted and approved all prior acts of the organizers and agents of the corporation. They point out that a contract entered into by a promoter in the name of or on behalf of a corporation prior to issuance of its Certificate of Incorporation can be adopted by the corporation after it comes into existence. *Real Estate Central, Inc.* v. *Kramer*, 254 M. 290, 255 A.2d 81 (1969); *Rosenberg* v. *Rolling Inn, Inc.*, 212 Md. 532, 129 A.2d 924 (1957); 1 Fletcher, *Cyclopedia of Corporations*, 207, 208, 214. Moreover, the corporation's adoption of such a contract may be express or it may be implied from the corporation's acceptance of the benefits and its fulfillment of the burdens of the contract. *Rosenberg* v. *Rolling Inn, Inc.*, *supra*. The court finds from the facts that Associates had impliedly adopted the acts prior to its incorporation; it has accepted the benefits therefrom and substantially complied with its burdens. The case of *Accurate Construction Co.* v. *Washington*, 378 A.2d 681 D.C.App., 1977), cited by the plaintiffs is inapplicable and distinguishable on its facts. Hence, the obligations of Cooperative, entered into prior to Associates' incorporation, are binding to the extent they have not been modified by the court herein. The court also finds that Cooperative itself has impliedly adopted the acts of December 6, 1974, having accepted the benefits and fulfilled the burdens of its contracts and its Board of Directors now being properly constituted under Title 29, D.C. Code, § 813, *et seq*.

With respect to the adoption of Associates, however, the court finds that Associates has failed to fully perform two of its contractual obligations. The language of one of the agreements dated December 6, 1974 (D's 11) is: "Cooperative agrees to assign to Associates all right, title and ownership to the said Mutual Ownership Contracts representing 100% ownership for the *sole purpose* of Associates selling these contracts to others who may wish to buy them." (Emphasis added). In the individual mutual ownership contracts, it is provided: "The Association acknowledges that the membership of Wisconsin Avenue Associates, Inc. is *only* for the *convenience of the transfer* of this mutual ownership contract to an owner for occupancy by way of sale or lease option . . ." (Emphasis added). The court finds that Associates has failed to fully perform its duties under the agreement to convey all of the units at 2720 Wisconsin Avenue for the

benefit of Cooperative. Rather, since the instigation of this litigation, Associates has maintained the unsold units for every purpose *but* that which is specified by the agreement. The primary objective undoubtedly has been to wield leverage over the plaintiffs, which in and of itself is not untenable. But, by a series of acts which have demonstrated a blatant disregard for the Rules and Regulations, was well as the maintenance of the property, Associates has caused turmoil in the building. The court therefore enjoins Associates and thereby orders it to cease and desist any and all efforts to sell or lease the remaining unsold units. The court further finds from the uncontradicted evidence that Associates failed to fully perform its obligations as warranted by an "apartment preparation" sheet (D's 33). The court accepts plaintiffs' Attachment B to their Proposed Findings of Fact, which is a list of the work not performed, as the extent of liability on this issue, subject to proof of damages.

The court is not persuaded that the plaintiffs' evidence has risen to the level of proving fraud in this case. Fraud requires proof of misrepresentation of a material fact made with knowledge of its falsity and with intent to deceive. Quoting from *Post* v. *U.S.*, a case heavily relied upon by plaintiffs: "Mere breach of fiduciary obligation does not itself constitute active fraud; there must be a specific intent to defraud." 132 U.S.App. 189 at 199 (1968). While the court has found a breach of fiduciary duty, it cannot conclude that there was a specific intent to defraud on the part of the defendants.

Plaintiffs also seek an award of attorney's fees for prevailing in this action. Such an award, while an exception to the general American rule that each party to an action must bear his own costs, can be awarded where the action involves: a) a breach of fiduciary duty, b) mismanagement by a trustee, c) the taking of secret profits, d) overriding considerations of justice that compel it, or e) activity that justifies an award of attorneys' fees by way of punitive damages. See *Wolff* v. *Calla*, 288 F.Supp. 891 (E.D. Pa., 1960); *Wilmington Trust Co.* v. *Coulter*, Del., Ch., 208 A.2d 677 (1965); *In Re Bausch's Estate*, 208 App. Div. 482, 115 N.Y.S.2d 278 (1952); *Fleischman Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). The courts of the District of Columbia recently recognized the

appropriateness of an award of attorneys' fees to prevailing litigants in *Belmar Realty Co.* v. *Bownan*, 106 Wash. L.Rptr., p. 673 (D.C.Sup.Ct., Feb. 24, 1978). There the court acknowledged the numerous cases of this jurisdiction allowing fees as an exception to the general rule, e.g., *1901 Wyoming Avenue Cooperative Ass'n.* v. *Lee*, 345 A.2d 456 (D.C.C.A. 1975); *F. W. Berens Sales Co., Inc.* v. *McKinney*, 310 A.2d 601 (D.C.C.A. 1973); and *Continental Insurance Co.* v. *Lynham*, 293 A.2d 481 (D.C.A. 1972). In *1901 Wyoming Avenue Cooperative Ass'n., supra*, the court stated, at 464-465:

> "There are, of course, exceptions. The relevant ones in this action are that where a party brings or maintains an unfounded suit or withholds action to which the opposing party is patently entitled, as by virtue of a judgment or *because of a fiduciary relationship*, and does so in bad faith, vexatiously, wantonly, or for oppressive reasons, reasonable attorneys' fees may be allowed. *F. W. Berens Sales Co.* v. *McKinney*, 310 A.2d at 603." (Emphasis added).

The court has found herein a breach of fiduciary duty that has certainly contained an element of bad faith in the overreaching connected with the $100,000.00 note and the type of oppressive reasons described in the case law in the defendants' misstatements of the budget. For these reasons the court will receive testimony respecting the reasonable value of attorneys' fees. However, it is important to note that this finding of bad faith is not extant throughout the entire dealings of defendants with the plaintiffs. In its most recent opinion in this area, *Altman* v. *Central Georgia Railway Co.* (decided May 19, 1978), the United States Court of Appeals stated: "The crucial question in determining the amount of the fees to be awarded to appellants was what portion of their work could properly be deemed productive of that benefit [to the plaintiffs], the creation of which was the basis of their being awarded a fee."

The corporate defendants, Associates, Metropolitan Mortgage Bankers, Inc., Real Estate Equity Management, Inc., Scenic Travel, Inc., Real Development Management, Inc. and Conference Management Group, Inc., are owned or controlled by the defendant Laurins and at one time or another served as conduits for the various notes

executed for Cooperative by him, i.e., the $945,000.00, $100,000.00, $5,700.00 and the individual collateral notes. The court deems these entities liable because of their claim to ownership, possession or control of these instruments or the proceeds thereof. The participation by these corporate entities through and as directed by Mr. Laurins was of necessity knowledgeable and subjected them to the liability, as declared above, of Laurins individually. The defendant corporation VAL Management's liability is predicated upon its contract for maintenance and the effect of its failure to perform as found above.

The liability of the individual defendants Laurins and Norman is specified above. As to the remaining individual defendants, Ms. Chasen, Ms. Thompkins and Mr. Baden, originally officers or directors of Cooperative, the court finds that their failure to act on behalf of their corporation evidences a breach of fiduciary duty. However, the court reiterates that these defendants were mere employees of Mr. Laurins and as such their participation in this scheme is essentially of a passive nature.

Therefore, as to Count I of the Amended Complaint, which seeks several declaratory judgments, the body of this opinion resolves all of these with the exception of those which relate to damages and costs which must of necessity be deferred until the second stage of this trial.

Count II was the subject of a directed verdict by consent. Count III of the Amended Complaint requests an accounting for all indebtedness incurred by Cooperative. This litigation itself has resulted in a substantial accounting by the defendants. If the additional evidence elicited at trial as to damages raises further problems which need to be the subject of an accounting, the court will so order.

As to Count IV, Breach of Contract, the court renders its verdict in favor of the plaintiffs.

Count V is duplicitous and treated in the court's finding as to Count IV.

As to Count VI, alleging a breach of fiduciary duty and unjust enrichment, the court's verdict is in favor of the plaintiffs with the body of the opinion resolving the outstanding issues.

Count VII is similarly dealt with and expounded upon in the body of the opinion, the court's verdict being in favor of the plaintiffs.

Count VIII, which sought an injunction, was the subject of a directed verdict by consent.

As to Count IX, alleging fraud and deceit, the court finds in favor of the defendants.

The court similarly finds in favor of the defendants on Count X, which seeks a declaratory judgment.

As to Count XI, seeking a declaratory judgment, cancellation and reformation based on District of Columbia Cooperative Association Act, the court finds in favor of the defendants.

Count XII, alleging fraud and deceit was dismissed by the court at the close of the plaintiffs' evidence.

Defendants have a counterclaim against the plaintiffs for tortious interference with the defendants' contractual relations with their tenants and the alleged right of the defendants to sell apartment interests in the building under the assignment. The factual basis for this counterclaim is primarily the posting of a notice in the lobby of the building, which notice essentially informed prospective purchasers of the existence of this lawsuit, as well as some sporadic oral communication along those lines between individual plaintiffs and prospective purchasers. The plaintiffs also distributed a so-called "notice to quit" on the advice of counsel, which was also essentially a description of the pending litigation. As stated by the District of Columbia Court of Appeals in the recent case of *Alfred Altimont, Inc.* v. *Chatelain, Samperton & Nolan*, 374 A.2d 284, 288 (D.C.C.A., 1977):

> "In order to recover for inducement of breach of contract, four things must be proven: 1) existence of a contract, 2) knowledge of the contract, 3) intentional procurement of its breach by the defendant, and 4) damages resulting from the breach. *Hunter Vending Co.* v. *D.C. Vending Co., Inc.*, 345 A.2d 142, 143 (D.C.C.A., 1975). Once a prima facie case has been established liability may still be avoided if the defendant can establish that his conduct was legally justified or privileged. *Deoudes* v. *G. B.*

Macke Corp., 153 A.2d 309 (D.C. Mun.App., 1959); *Meyer* v. *Washington Times Co.*, 64 App.D.C. 218, 76 F.2d 988, Prosser, *Torts*, § 129 (4th Ed., 1971)."

Prosser, § 129 defines a privileged interference, in part, as follows:

"Where the defendant acts to further his own advantage, other distinctions have been made. If he has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it; and for obvious reasons of policy he is likewise privileged to assert an honest claim, or bring or threaten a suit in good faith, to exercise the right of petition to public authorities, or to settle his own case out of court. *Id* at 944-945.

In this case, Cooperative's notices to prospective and existing tenants of Associates were prompted by Associates' refusal to pay maintenance fees and to participate in the necessary upkeep of the building, thereby placing a severe burden on Cooperative. The court finds that Cooperative's actions were legally justified, privileged and reasonable under the circumstances. Associates' claims against plaintiffs for interference with Associates' contract are therefore denied on the merits.

Defendants' Counterclaim III asserts that the existence of this litigation has injured the reputation of defendants Laurins and Wisconsin Avenue Associates. Defendants put on only one witness, Mr. Nussdorf, to discuss Mr. Laurins' reputation and the effect of this lawsuit. Mr. Nussdorf, however, supplied no information of Mr. Laurins' general reputation but did state that his decision not to invest in Mr. Laurins' projects was in part predicated upon the instant lawsuit. Mr. Nussdorf also testified that he had no knowledge of the fifteen lawsuits recited by plaintiffs' counsel during cross-examination, all of which predated this action and named Mr. Laurins or Laurins' controlled entities as defendants, one of which involved a judgment against Laurins personally for approximately $4,000,000.00. Mr. Nussdorf testified that if he had been aware of those lawsuits, they most assuredly would have affected his decision to terminate his investment with Mr. Laurins. The remainder of the

defendants' evidence in this regard consisted of Laurins' own testimony of a rather general nature that his reputation had been harmed and the fact, brought out on cross-examination, that a number of individual plaintiffs had communicated their involvement in the instant suit to relatives and associates. The defendants' evidence does not establish either the fact of injury or the existence of reputation and defendants have, therefore failed to carry their burden of establishing injury to reputation. Even if the lawsuit had been shown to somehow have affected Mr. Laurins' reputation, the existence of the lawsuit is a privileged communication that could have been made directly to one of Mr. Laurins' investors by the plaintiffs without liability. See *Altimont, supra*, at 290, Restatement of Torts, § 596. The court finds no evidence that the plaintiffs abused their privilege. This Counterclaim is likewise denied on the merits.

Defendants' Counterclaims X and XI charge Cecile de Rochefort with breach of her employment contract with defendants and negligent performance of her employment contract with defendants and negligent performance of her employment contract by her alleged failure to carry out certain oral instructions and orders from agents of defendant Associates. Ms. de Rochefort was the primary sales representative of the defendants at the Cooperative location. She personally dealt with most if not all of the individual plaintiffs by showing them their units and supplying the relevant documents discussed herein. The defendants urge that if some of these documents, such as the Deed of Trust, budget or most recent balance sheet, were not provided purchasers, it was the fault of Ms. de Rochefort and not ascribable to them. The court finds that Ms. de Rochefort did exactly what the defendants expected of her and therefore fulfilled her contractual obligations. She was employed as a mere "front," a public relations figure whose duties were to meet the public and display the units. If there were any substantive questions or difficulties, her instructions were to refer them to the defendant Mr. Norman and she did so. Ms. de Rochefort knew no more nor less than the defendants desired. The court's finding that the $945,000.00 indebtedness was adequately disclosed essentially eliminates the other grounds on which these two counterclaims were based.

The remaining two counterclaims concern the nonpayment on the $100,000.00 and $5,700.00 notes. The court has dealt with and modified these obligations of Cooperative above and thus, as to these counterclaims the court finds in favor of the defendants, subject to proof of specific amounts of entitlement and recovery pursuant to this decision.

Thus, as to Counterclaim I, tortious interference with contract, Counterclaim III, damage to reputation and Counterclaims X and XI, for breach of contract and negligent performance, the court finds that defendants have failed to establish by a fair preponderance of the evidence their entitlement to recover and thus the court's verdict is in favor of the plaintiffs. As a measure of equitable relief as to which plaintiffs have established their entitlement, the court hereby enjoins the defendants, each and all of them, from performing any act designed to accomplish the sale or further leasing of the eleven (11) unsold units pending final adjudication of this case.

June 27, 1978

William E. Stewart, Jr.
Judge

cc: Richard A. Hibey, Esq.
Robert B. Wallace, Esq.
Attorneys for Plaintiffs

Glenn D. Simpson, Esq.
Attorney for Defendants

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 2583-76
Civil I — Judge Belson

2720 WISCONSIN AVENUE
COOPERATIVE ASSOCIATION, INC., *et al.*,
Plaintiffs.

v.

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*,
Defendants.

JOINT STATEMENT OF UNDISPUTED FACTS

1. On December 6, 1974, the Articles of Incorporation for 2720 Wisconsin Avenue Cooperative Association, Inc. ("Cooperative") were accepted by the District of Columbia for filing pursuant to the Cooperative Association Act of the District of Columbia, 29 D.C. Code § 801, *et seq.*

2. The Articles of Incorporation of Cooperative designated Laurins, Norman, Baden, Tompkins and Chasen as the initial Board of Directors of Cooperative.

3. At all times material hereto Norman, Baden and Tompkins have been employees, officers or directors or companies controlled by Laurins and owned by Janis Laurins and Kimberly Laurins.

4. Throughout December 1974 and until approximately March 1975, Chasen was an employee, officer or director of companies owned or controlled by Laurins.

5. Norman is an attorney-at-law licensed to practice in the District of Columbia since 1970.

6. Laurins is an attorney-at-law and a member of the District of Columbia Bar.

7. The Articles of Incorporation of Wisconsin Avenue Associates, Inc. ("Associates") were stamped by the District of Columbia Government as received January 6, 1975 under the Business Corporation Act of the District of Columbia, 29 D.C. Code § 901, *et seq*.

8. The Articles of Incorporation of Associates designated Laurins, Baden and Norman as the initial Board of Directors of Associates.

9. The purchase price of the building located at 2720 Wisconsin Avenue, N.W., Washington, D.C. included the assumption of two pre-existing deeds of trust on the property in the aggregate sum of $243,815.

10. On December 6, 1974, a third deed of trust in favor of the Jawishes in the amount of approximately $431,000 was executed by Laurins on behalf of the Cooperative.

11. On December 6, 1974, a fourth deed of trust, mortgaging the property at 2720 Wisconsin Avenue, N.W., Washington, D.C., and a deed of trust note in the amount of $945,000 secured thereby, were executed in the name of Cooperative by Laurins and attested to by Baden in favor of Associates.

12. At all times material hereto, the general partner of Co-Op Mortgage Investors L/P (hereinafter "Co-Op L/P") has been a corporation controlled by Laurins and owned by Kimberly Laurins and Janis Laurins.

13. At all times material hereto, Metropolitan Mortgage Bankers, Inc. ("Metropolitan"), an entity controlled by Laurins, acted as the collection agent of Co-Op L/P for payments on the $945,000 deed of trust note made by individual members of plaintiff Cooperative.

14. At the time of the transfer of the $100,000 note to Co-Op L/P, the general partner of that entity was Real Estate Equity Management, Inc., a corporation controlled by Laurins and owned by Kimberly Laurins and Janis Laurins.

15. On December 6, 1974, Cooperative and Associates entered into 49 Mutual Ownership Contracts. These documents were executed by Norman on behalf of Associates, and by Laurins on behalf of Cooperative, and attested by Tompkins in her capacity as Secretary of Associates, and by Baden in her capacity as Secretary of Cooperative.

16. At settlement, each individual purchaser was given a copy of the Mutual Ownership Contract, to which was appended a document entitled "Transfer Agreement," by its terms transferring to the purchaser at one and the same time, personal liability on a *pro rata* portion of the $945,000 deed of trust note and the "rights and privileges" of a member of the Cooperative.

17. The Transfer Agreement and copy of the Mutual Ownership Contract to which it was attached purported to evidence the purchaser's membership in the Cooperative; ownership of their proportionate share and the right to perpetual use of their share of the Cooperative.

18. The downpayment notes, entitled "Cooperative Apartment Collateral Notes" (hereinafter "downpayment collateral notes") varied in amount from purchaser to purchaser, but ranged typically from $1,500 to $3,000.

19. Each downpayment collateral note was secured by a pledge of the Mutual Ownership Contract of the individual purchaser.

20. The marketing of the mutual ownership contracts in the Cooperative involved, in part, doing the advertising, settling, and "all that is required to sell the apartment units . . . ."

21. The apartment units were sold "as is."

22. As of the time this suit was instituted, Associates has sold approximately 38 of the total 49 units.

23. The amount of money or indebtedness representing the difference between the actual price paid for each mutual ownership contract and the *pro rata* share of the $945,000 indebtedness attributable to that mutual ownership contract went to Associates, from which Associates paid some of its business expenses.

24. The average price of the mutual ownership contracts was approximately $23,000 each.

25. The differential between the face amount of the $945,000 note and the $675,000 aggregate amount of the underlying deeds of trust was $270,000. The cash difference between the aggregate amount of the underlying deeds of trust and the $750,000 paid to the Jawishes was $75,000.

26. One element of consideration given to Cooperative by Associates in exchange for the $945,000 deed of trust and deed of trust note was the assignment to the Cooperative of a "right" to purchase the building.

27. The "right" to purchase the building arose in part from a sales contract entered into by the prior legal record title holders, who were Marjory and Henry Jawish, and an entity known as A. V. Laurins & co., Inc.

28. The nominee role of A. V. Laurins & co., Inc. was evidenced in part by a written nominee, or agency, agreement.

29. At the time of the execution of the sales contract of November 13, 1974, and at the time of settlement and closing on the property, the legal record title holders of the property were Marjory J. and Henry Jawish.

30. Some other elements of consideration given to the Cooperative, according to the testimony of defendant Norman, were the following:

(a) An agreement to advance monies that might be required to renovate the building and put the common areas in such a position that it could be sold;

(b) The provision of "credit checks" for prospective purchasers;

(c) The provision of legal services to obtain a zoning variance for the canopy in front of the building; and

(d) The provision of a "full-time" employee on the property for "emergency situations" during 1975.

31. the "employee" maintained on the premises for emergency purposes was Mr. Artur Alexander, husband of Mrs. Aleye Alexander, the resident manager.

32. During 1975, Mrs. Aleye Alexander was remunerated at the rate of $275 per month gross pay by checks drawn on the Cooperative's funds.

33. The $945,000 deed of trust and deed of trust note were drafted by Laurins and Norman.

34. Norman participated in the drafting of both the Assignment of Purchase Agreement (plaintiffs' deposition exhibit 34) and the Agreement dated December 6, 1974 (plaintiffs' deposition exhibit 50).

35. On December 6, 1974, Cooperative and Associates entered into a written agreement drafted by Norman to assign to Associates 100% of all the membership interests in the Cooperative for the purpose of Associates selling membership interests to individual purchasers.

36. By the terms of the Mutual Ownership Contracts between Cooperative and Associates, the parties agreed that "all the rights and privileges of membership" were extended to Associates only so that Associates could extend the same to individual purchasers.

37. On January 1, 1975, Cooperative entered into a property management contract with VAL Management Co., Inc. for $450.00 per month. Such contractual arrangements ceased on April 1, 1976.

38. No payments have been made by the Cooperative or on its behalf on either the $100,000 or $5,700 unsecured promissory notes, which first payments were by the terms of the instruments due December 1, 1976.

Respectfully submitted,

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/s/ ROBERT B. WALLACE
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October 3, 1977.

* * * *

[ATTACHMENTS TO OPINION, EX. B AND EX. C OMITTED]

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 2583-76
Civil I — Judge Stewart

2720 WISCONSIN AVENUE
COOPERATIVE ASSOCIATION, INC., *et al.*,
Plaintiffs,

v.

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Findings Of Fact And Conclusions of Law (Issues Of Damage)

Having conducted the first phase of a bifurcated trial on the issue of liability and having resolved those issues by Memorandum Opinion dated June 27, 1978, 106 WLR 1417 (August 8, 1978), the court received evidence on the issues of damages relevant to the various claims asserted by the parties, as well as counterclaims. These claims are numerous and stem from the promotion, sale and maintenance of a cooperative apartment complex.

This court's prior opinion established that a basis existed for the recovery of money dmages by both plaintiffs and defendants (counterclaimants) and the parties approached and participated in the second phase of this trial with the same animosity and hostility that had been exhibited in the original proceedings on the issue of liability. Though the court has had the benefit of submissions of Proposed Findings of Fact and Conclusions of Law and oral argument in accord with a time table as requested by counsel, neither has been as helpful as hoped for to assist the court in the resolution of unique and complex problems.

Plaintiffs in this action consist of a District of Columbia cooperative housing association and 25 of its members in their individual

capacity. They sought, and have been awarded, declaratory relief with regard to onerous and confiscatory provisions of a deed of trust prepared and executed by defendants Laurins and Norman.[1] Plaintiffs also requested, and have been awarded, injunctive relief against defendants which enjoins the sale or further leasing of the eleven unsold apartment units in the complex pending final adjudication of the dispute. They now seek an award of money damages for breaches of fiduciary and contractual duties, attorneys' fees and litigation costs and punitive damages.

Having concluded that plaintiffs were entitled to the cancellation of two outstanding notes executed in favor of defendants, the court permitted defendants to amend their counterclaim to assert a *quantum meruit* claim for recovery of settlement costs and renovation expenses incurred by defendants. Defendants also contest plaintiffs' claim for damages asserting that plaintiffs received value far in excess of the purchase price of the complex. Thus, they conclude that any award of compensatory damages should be offset or eliminated by the monetary benefit allegedly conferred to plaintiffs.

From the outset, however, it is important to note that the court's view on defendants' "value received" defense is that it is misconceived. Defendants have attempted to invoke the defense as a complete bar to all allegations of misconduct in all of the transactions between the parties. Their view, essentially, is that plaintiff-cooperative received such a great bargain on the purchase of the building that defendants could, in any subsequent transactions, deal unfairly with plaintiffs as long as there was no net loss to plaintiffs. However, defendants' duty to deal fairly with plaintiffs, which arises from the fiduciary relationship of the parties must apply to each separate transaction. Common sense and rational thinking can lead to no other conclusion. If it were otherwise the court would be sanctioning the breach of fiduciary duties, at the will of the fiduciary, every time that hindsight shows that a party received a favorable deal in a

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[1] The relationships between the various individual defendants and corporate defendants is discussed in the Court's Memorandum Opinion on liability and as incorporated herein by reference.

transaction with the fiduciary. He will forever attempt to even the score with the persons that have placed their faith and trust with him. Considering the fact that the instant action involves interlocking directorates and self-dealing transactions, the adoption of such a theory, especially in this context, would lead to a totally unacceptable result. Thus, the court will consider the defense only as it relates to individual transactions.

Under the $945,000.00 Deed of Trust note, the court has already concluded that value was received. (Memo. Op. at p. 8-9). This, of course, does not affect the court's ruling on the unenforceability of the four provisions of the Deed of Trust or the court's finding that defendants' conduct was oppressive and in bad faith. The court, however, has also concluded that plaintiff-cooperative did not receive value for the $100,000.00 note obligation. Thus it has been cancelled and a finding of fiduciary breach has been entered. The court has similarly treated the obligation of the Cooperative under the terms of the $5700.00 note but as to each has ruled that the defendants may offer proof on a quantum meruit basis as to both notes though such proof as to the $100,000.00 note is limited to its legitimate closing costs and as to actual value received on the $5700.00 note. The value received defense as it applies to the misrepresentation on the maintenance budget will be considered below.

I. Maintenance Budget Misrepresentations.

The court has found that defendant Laurins, acting through defendants VAL Management and 2720 Wisconsin Avenue Associates and as president of plaintiff Cooperative breached his fiduciary duty to the individual unit purchasers by misrepresenting certain items in the maintenance budget prepared for plaintiffs, including his failure to declare known facts. The net effect of the misrepresentations gave plaintiffs an unrealistic indication of the amount of the maintenance fees to be paid to VAL Management in future years (Memo. Op. p. 20).

During the damage phase of the trial, plaintiffs have asserted that they should be awarded what has been termed "benefit of the bargain" damages. Under this theory of recovery, plaintiffs essentially con-

clude that since they each bargained for a unit with a certain maintenance fee obligation which, of necessity, rose dramatically in the following year as a result of the misrepresentation in the budget of the previous year, that they are entitled to damages equivalent to the difference bwtween what the maintenance fees would have been had the budget been accurate and the maintenance fees actually paid, projected over the useful life of the building (30 years). This amount, after being discounted to present value, is approximately ($481,000.00 if fees for all of the units are combined.

The court is of the view, however, that the benefit of the bargain theory has not been adopted in the District of Columbia. Even in cases where fraud was alleged and proven,[2] the more conventional "out of pocket" measure of damages has continually received enforsement. *Espaillat* v. *Berlitz School of Languages of America*, D.C.App., 217 A.2d 655, 657 (1966) (measure of damages in fraud action was amount lost by deception, not what might have been gained if misrepresentation had been true), *Horning* v. *Ferguson*, D.C. App., 52 A.2d 116, 119 (1947) (damages in action for fraud is difference between purchase price and fair market value, not "loss of the bargain" damages), *Sigafus* v. *Porter*, 179 U.S., 116, 125, 21 S.Ct. 34, 37, 45 L.Ed. 113 (1900) (same), *Smith* v. *Bowles*, 132 U.S. 125, 129-30, 10 S.Ct. 39, 40-41, 33 L.Ed. 279 (1899) (same). In fact, plaintiffs cite no case that supports their position.

Under the proper theory, the permissible damage computation is the difference between the fair market value and the purchase price. *Horning* v. *Ferguson*, *supra*, 52 A.2d at 119. Should be fair market value exceed the purchase price, plaintiffs have not been injured in a legal sense regardless of the egregious nature of the misrepresentation. Furthermore, even if the purchase price exceeds the fair market value, there must be a causal connection between the misrepresentation and the discrepancy in price and value. *Smith* v. *Bowles*, *supra*, 132 U.S. at 129-30.

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[2] In its Memorandum Opinion (p. 27-28), the court concluded that plaintiffs' proof did not rise to the level of fraud, although a finding of bad faith was entered as to certain claims asserted by plaintiffs.

Assuming the plaintiffs have shown causation in that the misrepresentation resulted in plaintiffs' willingness to pay a higher price plaintiffs have not sustained their burden of showing that any of the purchase prices exceeded fair market value.

Plaintiffs vigorously attacked defendants' evidence on fair market value. The pointed to numerous flaws in the appraisal report presented by defendants' expert, Mr. Conner and presented their own expert. Dr. Seldin, to rebut Mr. Conner's testimony. The court, in fact, agrees with plaintiffs that defendants'appraisal is deficient in many respects and does not fairly represent true fair market values of the units involved. However, plaintiffs presented no testimony to affirmatively establish what the fair market value of each unit was at the time of the respective purchases so that the court could measure the damages, if any, suffered by the individual plaintiffs. Even if the court concluded that purchase prices exceeded fair market value to some extent, without the required proof, any award of compensatory damages on this claim would be sheer speculation as even an approximation of the proper values would be impossible. However, an award of nominal damages in the amount of $1.00 per plaintiff will be entered against defendants and in favor of the individual plaintiffs. [3] This award is made on the basis that plaintiffs have proven the liability of defendants but have failed to meet their burden of proof on damages. *Chesapeake & Potomac Tel. Co.* v. *Clay*, 90 U.S.App. D.C. 206, 208, 194 F.2d 888 (1952).

II. Cost of Repairs.

Plaintiffs also seek an award of compensatory damages against defendant Associates for its failure to comply with its contractual duty to make certain repairs to units within the cooperative. Under this claim plaintiffs allege damage in the amount of $6,154.66. To support their claim, plaintiffs produced the testimony of two experts in the area of renovation. While the court has no reason to doubt any of the proffered testimony, plaintiffs' claim on this issue must fail. The estimate submitted by Mr. Samperton was prepared after an

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[3] The particular group of plaintiffs entitled to this award and defendants liable for the award is discussed *infra* on p. 14.

inspection on August 8, 1978, some 2-1/2 years after the date of the breach. Thus, the court is unable to determine what the cost of repairs would have been on the date of the breach and because there is no proof that the conditions of the units has not materially changed since the date of the breach, there is no way for the court to conclude that the repairs listed by the Samperton estimate are related solely to the condition of the unit at that time. Thus, a judgment in favor of the defendants and against plaintiffs will be entered on this issue.

III. Mutual Ownership Contract.

As noted in the court's Memorandum Opinion (p. 27) on the liability phase of the trial, defendant Associates obtained title to all of the units in the building from plaintiff Cooperative for the sole purpose of transfer to individual purchasers by way of sale or lease option. The transfer of title to Associates was accomplished through the Mutual Ownership Contract which recited certain duties that Associates was to perform in return for the right to collect all profits in excess of the pro-rata obligation for each individual unit which was sold. Of the total number of units in the building, eight remain unsold. These units are now occupied, however, under lease-options.

Thus, facially, defendant Associates has performed fully its contractual obligations to transfer by sale or lease-option all of the units in the building. However, a closer look at the transactions leads the court to conclude that Associates' conduct, acting through its agents and officers who were also officers and thus fiduciaries of plaintiff Cooperative, breached not only contractual obligations but fiduciary obligations as well as to the eight unsold units and three units purchased by defendant Laurins. [4]

Article 3, Section 4, of the by-laws of plaintiff Cooperative and paragraph 9 of the Mutual Ownership Contract make it abundantly

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[4] One of the units purchased by defendant Laurins was transferred in the name of his daughter, Kimberly Ann Laurins. Because this method was used, at least in part, to avoid the District of Columbia rental regulations, the purchase of this unit will be treated in a similar fashion to that of the two units purchased by defendant Laurins in his own name for purposes of awarding equitable relief.

clear that before any unit can be sold or lease-optioned, an application for such action must be approved by the Cooperative. For the eleven units mentioned above, consent was not obtained. In fact, the transactions were explicitly objected to by plaintiff Cooperative. This restriction on the sale or lease of the units is essential to the efficient operation of any cooperative because of its unique financial arrangement. The failure to obtain the consent is thus a clear and material breach of contractual duty.[5] Furthermore, because the officers of defendant Associates were also officers of plaintiff Cooperative, they held the fiduciary obligation to deal fairly with Cooperative. Thus, their failure to obtain consent was a fiduciary breach as well. Although it is uncontested that all of the questioned transactions took place at a point in time which was after defendants were voted out of office of the Cooperative, it cannot be concluded, in this context, that their fiduciary obligations ceased at that point. It is abundantly clear that the interlocking directorate arrangement between Cooperative and Associates was the main reason that the Mutual Ownership Contract was negotiated in the first place. In essence, Associates received an opportunity to make substantial profits as the result of the interlocking directorate situation, thus it is totally inequitable to conclude that Associates can use the advantageous position obtained while its officers were fiduciaries to plaintiffs over the rightful objection of plaintiffs, even though they no longer held office in the Cooperative.

In fashioning a remedy, the court will rescind the rights and obligations conferred upon the parties by the Mutual Ownership Contract as to each of the eleven units involved. The court is not of the view, as defendants contend, that it must rescind the sale of all of the units in the building. This is not the situation in which a party seeks to partially rescind an indivisible contract. *See Ward* v. *Deavers*, 92 U.S. App.D.C. 167, 170, 203 F.2d 72 (1953). Although the transfer of titles to Associates involved a single agreement between the parties, the sale of each individual unit involved a clearly divisible

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[5] Although no specific allegations are made in plaintiffs' Amended Complaint under the contract breach theory, the court will permit the relief to conform to the evidence presented during the trial. SCR-Civil Rule 54(c).

portion of the total performance required of Associates. Furthermore, defendants' theory, even if correct in the contract breach context, does not put in the question the court's authority to fashion this type of equitable relief in the fiduciary breach context.

To accomplish the rescission, the court will impose the following formula: 1) defendant Associates will not be obligated to pay any outstanding maintenance fees for the eleven units involved, 2) defendant Associates will receive a credit for all maintenance fees actually paid for the eleven units involved, 3) defendant Associates will pay over to Cooperative all monies received (rent and option payments) from the eight unsold units, 4) defendant Associates will pay a reasonable rental value to Cooperative for the three units purchased by Lurins* and 5) title to the eleven units will be transferred back to Cooperative. This formula is imposed so as to protect the interest of third parties holding lease-options[6] and to return the parties to the position they would have held had there never been a Mutual Ownership Contract as to the eleven units. The court will give the parties 30 days to arrive at a monetary figure under the formula above by consent, otherwise, the matter will be referred to the Auditor-Master.

IV. Punitive Damages.

Plaintiffs also seek an award of punitive damages on the issues in which the court has found bad faith or oppressive conduct on the part of defendants. *First Nat'l. Realty Co.* v. *Weathers*, D.C. App., 154 A.2d 548, 550 (1959), *Brown* v. *Coates*, 102 U.S.App.D.C. 300, 303-05, 253 F.2d 36, 39-40 (1958). The court in *Brown*, (id.), discussed the appropriateness of a punitive award in a case very similar to the instant action. In *Brown*, the defendant stood in a fiducary relationship to plaintiffs and engaged in conduct which breached his fiduciary duty with the intention of reaping secret profits

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[6] Plaintiffs' counsel conceded in oral argument that they do not seek to dispossess any current tenants or affect their ability to exercise their lease-options.

*Defendant Associates and/or Laurins will also receive credit for monies, if any, paid for their proportionate share obligations under the $945,000.00 note for the 11 units involved.

from plaintiffs. The court first noted the "broad public interest" in the performance of fiduciary duties and then concluded that, even though common law fraud had not been proven, that defendant's conduct was sufficiently culpable to sustain a punitive award. The court placed emphasis on the willfulness of the misconduct and the societal interest in deterring similar conduct. *See, First Nat'l. Realty Co.* v. *Weathers, supra,* 154 A.2d at 550 (taking of property without legal process was malicious, thus punitive award upheld) *with Mendes* v. *Johnson,* D.C. App., ___ A.2d ___, ___ (No. 10279, June 13, 1978) (en banc) (taking of property without legal process was, at most, an innocent mistake, thus punitive award set aside).

The same public policy considerations are applicable to the instant action. In two separate instances the individual defendants, while cloaked with their fiduciary obligations, breached their duty so that they or their corporate entities would reap a direct benefit at the expense of those to whom their duty was owned.

The court has concluded that the $100,000.00 note which was payable to defendant Associates was wholly without consideration. Defendants Laurins and Norman negotiated the note essentially as an afterthought, concluding that the purchase price of $945,000.00 was sufficiently low that the additional $100,000.00 could be tacked on. Such conduct was in direct conflict with their duty to plaintiff Cooperative as at the time the note was negotiated defendants were officers of both of the corporate entities involved in the transaction.

The court has considered the liability of defendants Chasen, Baden and Thompkins in regard to the award of punitive damages. While it is certainly true that those defendants breached their fiduciary duty the court does not find that their breach was aggravated by bad faith as was that of defendants Laurins and Norman. These defendants breached their duty by omission, not intention. They were essentially bystanders to the transactions complained of in this litigation and thus, the court will not hold them liable for the punitive award. Defendant Associates, however, as beneficiary of the note and acting through its officers, Laurins and Norman, is liable. *See Woodward* v. *City Stores Co.*, D.C. App., 334 A.2d 189, 191 (1975).

Therefore, for the bad faith, self-dealing brach of fiduciary duty in reference to the $100,000.00 note, an award of punitive damages will be entered in favor of plaintiff Cooperative against defendants Laurins, Norman and Associates in the amount of $30,700.00.

The court also concluded that defendants Laurins, Norman, Chasen, Baden and Thompkins [7] breached their duty to the individual plaintiffs by misrepresenting the 1975 maintenance budget. Although the court has concluded that plaintiffs have failed to prove their entitlement to a compensatory award on this issue, an award of nominal damages has been entered and thus, an award of punitive damages is appropriate. *First Nat'l. Realty Co.* v. *Weathers*, D.C.App., 154 A.2d 548, 550 (1959), *Wardman-Justine Motors, Inc.* v. *Petrie*, 59 U.S.App.D.C. 262, 265-66, 39 F.2d 512 (1930). Plaintiffs were induced by the misrepresentation, at least in part, to purchase their respective units. Defendants directly benefited from each of these sales as defendant Associates reaped all profits above the pro-rata obligation that each purchaser had under the Deed of Trust note. The court as concluded that although the level of proof did not rise to fraud, defendants' conduct was in bad faith (Memorandum Opinion p. 27-28). The court is of the view, however, that a punitive award on this issue should accrue only to those plaintiffs who entered into purchase contracts for their units before January 16, 1976. It was on that date that the increase in maintenance fees was disclosed. It is, of course, true that punitive damages are awarded to punish and deter defendants but the corollary to that theory is that the beneficiaries of the award should have a close relationship to the wrong committed. *Woodward* v. *City Stores Co., supra*, 334 A.2d at 191.

Thus, for the misrepresentation of the 1975 maintenance budget, a punitive award shall be entered in favor of those plaintiffs that entered into purchase contracts before January 16, 1976 and against defendants VAL Management and Associates, acting through their officers

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[7] The lack of culpability of defendants Baden, Chasen and Thompkins with regard to the award of punitive damages is discussed above and applies to the award of punitive damages under this issue as well. However, the award of nominal damages under the maintenance budget misrepresentation issue does run against these individual defendants.

and defendants Laurins and Norman in the amount of $500,00 per purchaser.

The court has also considered a punitive award for the defendants' conduct in reference to the four provisions of the Deed of Trust which the court has held unenforceable due to their unconsionable and oppressive nature. The court, as factfinder, has concluded however that even considering the effect that the provisions had on the marketability of the units, plaintiffs still received value for the $945,000.00 note obligation. Thus, although the court may have the authority to award punitive damages where there is a finding that plaintiffs suffered no economic loss, *see, Wardman-Justine Motors, Inc.* v. *Petrie, supra,* 59 U.S.App.D.C. at 262, the court will exercise its discretion, *Davis* v. *Schuchat,* 165 U.S.App.D.C. 351, 358 n. 7, 510 F.2d 731, 738 n. 7 (1975) and deny the request for a punitive award on this issue. The court is of the view that there is an important distinction between a failure to prove damages, as in the budget misrepresentation issue and a finding by a court that no damage was done. In the former instance, where it is likely that damages existed but plaintiffs have failed to meet their burden of proof, it can be inferred that defendants' state of mind was sufficiently culpable to support a punitive award. However, in the latter instance, where a finding that no monetary damage existed at all, the inference of the culpable mind does not apply.[8]

V. Attorneys' Fees.

Finally, plaintiffs' request an award of attorneys' fees and costs as to that portion of counsels' efforts that was directed toward issues in which the court concluded that defendants breached their fiduciary duty in bad faith. It is, of course, the American rule that attorneys' fees are to be borne by the respective parties regardless of the outcome of the litigation. *Alveska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240 (1975); *Fleischman Distilling Corp.* v. *Maier Brewing Co.,*

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[8] Plaintiffs' claim for a punitive award for defendants' conduct in regard to the sale of the three units to defendant Laurins and the leasing of the eight unsold units is materially incorporated into the equitable relief fashioned by the court under that claim.

386 U.S. 714, 717 (1967). However, as the court has already indicated in its Memorandum Opinion on the liability phase of the trial, an exception to the rule applies to this case. *Siegel* v. *William E. Bookhultz & Sons, Inc.*, 176 U.S.App.D.C. 138, 141-42, 419 F.2d 720 (1969); *Wolf* v. *Cohen*, 126 U.S.App.D.C. 423, 426, 379 F.2d 477 (1967); *see 1901 Wyoming Avenue Cooperative Ass'n.* v. *Lee*, D.C. App., 345 A.2d 456, 464-65 (1975); *F. W. Berens Sales Co.* v. *McKinney*, D.C.App., 310 A.2d 610, 612 (1973); *Continental Insurance Co.* v. *Lynham*, D.C.App., 293 A.2d 431, 483 (1972).

An award of attorneys' fees in a case in which a bad-faith breach of fiduciary duty is alleged and proven serves separate societal interests, which sets this type of case apart from the vast majority of civil litigation. First, the award serves as punishment against a defendant for his conduct which constituted bad-faith and a deterrence to others with similar intentions and second, the award serves as an inducement to counsel to institute similar litigation in an effort to expose conduct which breaches fiduciary obligations. It is of course true that the first consideration is amply provided for in the court's award of punitive damages. However, when the second consideration is added, the societal interest in protecting the unwary from unscrupulous fiduciaries is of such overriding magnitude that a separate award is appropriate.[9]

The award amounts, at least in part, to a recognition of the inherent conflict in the American system which on the one hand attempts to calculate damages in an effort to make the prevailing party whole and on the other hand denies an award sometimes amounts to the prevailing party's most substantial element of expense — attorneys' fees. For good and sufficient reasons, courts, including the Supreme Court, *Alyeska Pipeline Co.* v. *Wilderness Society*, *Supra*, 421 U.S. at 240, have continually reiterated their preference to the American rule that fails to consider legal fees as an element of compensation; but they have also recognized exceptions. Thus, the issue is one of balancing. Without question, the balance is very heavily weighted against an award of legal fees but where a case such as the instant

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[9] The court has specifically excluded the cost of attorneys' fees to plaintiffs in its effort to determine the appropriate punitive damage award.

action is presented, an award is justified. Justice Frankfurter, writing for the Court in *Sprague* v. *Ticonic Nat'l. Bank*, 307 U.S. 161, 167, 59 S.Ct. 777, 83 L.Ed. 1184 (1939) stated:

> ". . . Plainly the foundation of the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation . . . As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility."

Some of the issues litigated, however, did not involve the requisite bad-faith fiduciary breach. Thus, the court is of the view that only fees attributable to time expended on issues in which the court has made the requisite finding are to be taxed against defendants.

Plaintiffs' chief counsel, Richard A. Hibey, has supplied the court with a detailed affidavit which sets forth the total number of hours expended, [10] the number of hours expended on issues in which the plaintiffs allege that they are entitled to recover [11] and the hourly rates charged by each of the four attorneys who worked on the case. [12] The

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[10] 4,403.5 hours from February, 1976 to July 31, 1978.

[11] 2,205 hours.

[12] Four attorneys worked on plaintiffs' case. Their requests for fees are computed as follows:

	Attorney	Hours	Hourly Rate
1)	Richard A. Hibey	882.9	$ 75.00 Prior to 1/1/77 80.00 Prior to 2/1/78 90.00 From 2/1/78
2)	Jay L. Westbrook	182.8	$ 75.00 Prior to 1/1/77 80.00 Prior to 2/1/78 90.00 From 2/1/78
3)	Robert B. Wallace	573.9	$ 60.00 Prior to 4/1/77 65.00 From 4/1/77
4)	David C. Roseman	479.7	$ 35.00 Prior to 4/13/77 40.00 Prior to 4/1/77 45.00 Prior to 2/1/78 55.00 From 2/1/78

affidavit also sets forth the costs and expenses of the litigation. [13] The court agrees with plaintiffs that the average rate of $67.4 per hour is fair and reasonable considering the complexity of the case and the experience and talent of the attorneys involved. *See Evans* v. *Sheraton Park Hotel*, 164 U.S.App.D.C. 86, 503 F.2d 177 (1974); *compare Altman* v. *Central of Ga. Rlwy. Co.*, ____ U.S.App.D.C. ____ , ____ n. 1 (No. 77-1301, May 19, 1978) ($100 per hour is often held a reasonable rate) *with Copeland* v. *Marshall*, ____ U.S.App.D.C. ____ , ____ (No. 77-1351, October 30, 1978) (actual costs plus reasonable margin of profit is proper formula for award). Defendant Laurins cross-examined Hibey with regard to the affidavit in an extensive manner but failed to disclose any significant discrepancies. [14]

Under the six areas which plaintiffs contend that fees are awardable, a total of 2,059.3 hours was expended, amounting to a request of $138,745.25, which is approximately one-half of the total fees that plaintiffs' counsel have documented if all of the issues litigated are considered. As a threshhold matter, the court is of the view that only five of the six areas listed involve the requisite finding of both bad-faith and fiduciary breach. The court did not enter the requisite finding with regard to the defense of counterclaims, thus, 215.9 hours spent on this issue will be eliminated from the total hours requested.

Of the 1,843.4 hours that remain under the other five areas, the question of reasonableness still exists. The mere fact that the court file in this case totals approximately 55 volumes of court jackets is a strong indication of its over-litigation. Plaintiffs counsel are not solely responsible, however, as defendants proved to be exceptionally recalcitrant. The only thing of substance that plaintiffs' counsel and defendant Laurins agreed to was that they disagreed on everything. However it is important to note that the court is awarding less

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[13] Plaintiff's counsel have itemized costs amounting to $73,417.92, which includes fees for expert witness and paralegals. Of this total plaintiffs request an award of $45,358.07. The computation of the court's award for costs is discussed *infra*, p. 20.

[14] Defendant Laurins defended himself and all other defendants during the damage phase of the trial.

than one-half of all the counsel fees incurred by plaintiffs in this action. The court's authority to award the entire amount is, at least, an open question as there appears to be little, if any, precedent on this issue. Thus, the over-litigation factor was given adequate consideration in the court's decision to award fees only under the specified categories involving bad-faith fiduciary breaches. Thus, an award of $124,245.16 for attorneys' fees will be entered in favor of plaintiff Cooperative against defendants Laurins, Norman and Associates and VAL Mangement.

In addition to the award of attorneys' fees, plaintiffs also request an award of costs, including paralegal and expert witness fees. The court will award $9,974.48 in general costs. The award was computed by first dividing the total attorneys' fees awarded by the total attorneys' fees incurred. That ratio was then applied to the total costs incurred. Althoughthe methodology lacks complete precision, it does represent a fair approximation of costs incurred on the issues which the court has determined that attorneys' fees are properly awardable

The court is not convinced, however, that a sufficient evidentiary basis exists for the award of expert witness fees. Plaintiffs seek an award of $22,400.00 for the services of two experts, however, no testimony of affidavit has been elicited to detail what the request for costs is. It is thus impossible for the court to determine if the request is reasonable as the court has no idea what rate per hour was charged or how many hours were expended.

Finally, plaintiffs' request for an award of approximately $11,000.00 in paralegal fees is likewise void of sufficient evidentiary support. The court has not been informed as to the services actually rendered by the paralegals or their necessity. Furthermore, the cost of paralegals was considered by the court in its determination that the hourly rate charged by the attorneys was reasonable.

VI. Counterclaims of Defendants.

In its Memorandum Opinion on liability, the court announced that it would hear further evidence on defendant Associates' counterclaim on a *quantum meruit* basis for the costs of certain renovation rendered to Cooperative and the costs of closing the sale of Cooperative.

Plaintiffs agree that Associates is entitled to $30,700.00, which represents $21,334.10 in renovation costs and $9,365.90 in closing costs. Defendant Associates, however, alleges that it is entitled to costs of overhead and a margin of profit for the renovation work which was completed. The court views these additional requests as an effort by Associates to obtain a windfall. The measure of damages under a *quantum meruit* theory is the reasonable value of the services rendered, as it is based upon equitable principles. *See H. G. Smithy Co.* v. *Washington Medical Ctr.*, D.C.App., 374 A.2d 891, 893 (1977), *Bloomgarden* v. *Coyer*, 156 U.S.App.D.C. 189, 479 F.2d 201 (1973). In the instant case, the court concludes that the reasonable value of the renovation services rendered is the value which Associates placed upon the services before this litigation was brought. That value is fully represented in the agreed upon figure. Thus, the court will enter an award of $30,700.00 on defnendant Associates' counterclaim against plaintiff Cooperative.

Though the court believes its conclusions and the relief afforded to be abundantly clear in this opinion, it is recognized that finality at this point is not possible. To preclude either dilemma or prejudice to either party in seeking appellate review of this opinion, the court reiterates, of necessity, that this is not a final judgment because of the obvious necessity of determining by stipulation or reference to the Auditor-Master of the court the accounting required to ascertain: 1) the amount of credit, if any to be given to defendants Associates and Laurins for any maintenance fees paid and also monies, if any, paid by Associates and Laurins as their proportionate share of the indebtedness under the $945,000.00 First Deed of Trust; 2) all monies received (rent and option to purchase payments) from the 8 unsold units; 3) the establishment of a reasonable rental value of the 3 units purportedly purchased by Laurins.

Since this litigation has been expensive and protracted, the court feels it appropriate to offer the parties the opportunity to stipulate in regard to these relatively simple matters, which would be followed by entry of final judgments. Most of the information required is within the possession of the defendants and the court would contemplate a statement of such figures from those records being furnished to the plaintiffs with the opportunity afforded to plaintiffs' counsel to verify

the figures from the records of the defendants. Failure of the parties to arrive at a stipulation will result, thirty days hereafter, in reference to these issues, to the Auditor-Master of the court. The parties must anticipate some delay and costs associated therewith.

If the parties do stipulate re the above-described issues, which stipulation should be in writing and submitted to the court within thirty days of this opinion, then counsel for the plaintiffs will, within five days thereafter, submit an order encompassing all judgments and the defendants shall have five days thereafter to submit their proposed order. Execution of one or the other, or a combination of such, will become the final order of the court. Necessity for referral of this matter to the Auditor-Master will obviously alter this time table.

/s/ WILLIAM E. STEWART, JR.
William E. Stewart, Jr.
Judge

December 18, 1978

cc: Richard A. Hibey, Esq.
Robert B. Wallace, Esq.
Attorneys for Plaintiffs

Aleksandrs V. Laurins, Esq.
Attorney for Defendants

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Action No. 2583-76

2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC., a corporation, *et al.*,

Plaintiffs,

v.

WISCONSIN AVENUE ASSOCIATES, INC., A District of Columbia Corporation, *et al.*,

Defendants.

ORDER AMENDING MEMORANDUM OPINION AND ORDER OF REFERENCE TO AUDITOR-MASTER

The Court, *sua sponte*, pursuant to SCR-Civil Rule 60(a), hereby amends the following portions of its Memorandum Opinion dated December 18, 1978 to reflect a change in the number of unsold units in the cooperative complex from eight to nine and the number of units sold to Defendant Laurins from three to two:

1) p. 9, line 30;
2) p. 10, line 8; n.4, line 5;
3) p. 12, line, 2, 3;
4) p. 15, n. 8, line 2;
5) p. 21, line 22, 23.

The nine unsold units involved are units numbered 103, 104, 106, 107, 204, 207, 501, 703, 805. The two units purportedly sold to Defendant Laurins include unit 302 sold to Defendant Laurins in his own name and unit 801/802 sold to Defendant Laurins and placed in his daughter's name.

And it is further ordered, pursuant to SCR-Civil Rule 53, that this matter be and hereby is referred to the Auditor-Master of this Court to conduct proceedings in accordance with the Court's Memorandum Opinion of December 18, 1978 as amended. (See pages 11, 12 and 21 of Memorandum Opinion in particular) and to furnish to the Court the report of the Auditor-Master within ninety (90) days of the date of this Order.

January 19, 1979

William E. Stewart, Jr.
Judge

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 2583-76
Civil I — Judge Stewart

2720 WISCONSIN AVENUE
COOPERATIVE ASSOCIATION, INC., *et al.*,
Plaintiffs,

v.

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION
ORDER
AND
FINAL JUDGMENTS

This court has previously filed Memorandum Opinions dated June 27, 1978 and December 18, 1978 following bifurcated trials of the instant case. The former Opinion treated the subject of liability and latter the issues of damages, leaving for resolution the final amounts of judgments dependent upon an accounting to be supplied by stipulation of the parties or, failing in that, by reference to the Auditor-Master of the court.

When the stipulation was not forthcoming within the allotted 30-day period, this court filed its Order of January 19, 1979 amending Memorandum Opinion of December 18, 1978 and referring this matter to the Auditor-Master of the court to conduct proceedings in accordance with the court's Memorandum Opinion of December 18, 1978 and to furnish a report to the court within 90 days.

Though the Auditor-Master promptly proceeding to schedule hearings the same were delayed by reason of the fact that the defendant, Wisconsin Avenue Associates, Inc., filed, on January 23, 1979, a petition in the United States District Court Bankruptcy No. 79-00012, under Chapter XI of the Bankruptcy Act and also filed in this

court a Suggestion of Lack of Jurisdiction to Proceed against defendant, Wisconsin Avenue Associates, contending that the filing of the petition in the Bankruptcy effected an automatic stay upon further proceedings in this court. The plaintiffs countered by filing, under date of February 16, 1979, a Motion for Entry of Judgment pursuant to Rule 54(b) of the Civil Rules of the Superior Court. On March 27, 1979 the Honorable Roger M. Whelan, Bankruptcy Judge, United States District Court for the District of Columbia, found that the petition of Wisconsin Avenue Associates, Inc. under Chapter XI of the Bankruptcy Act was not filed in good faith and dismissed the case. (Copy of said Order and Memorandum of Law is attached as Exhibit-A). Under date of March 29, 1979, this court denied the motion of the plaintiffs for Entry of Judgment (pursuant to Rule 54(b).

The report of the Auditor-Master was filed on April 16, 1979 but it was hand delivered to counsel on April 13, 1979 at the time of their execution of a stipulation attached to the report and forming a part thereof. (Attached as Exhibit-B).

The report of the Auditor-Master is accepted and approved.

In executing the stipulation made a part of the Auditor-Master's report, the parties agreed to submit the following questions to the court:

(a) Q. Whether defendant may claim a credit for advertising expense, repairs, renovation and overhead, among other things, in connection with the actual leasing, care and supervision of the apartment units in question. Defendant claims the amount of such expenses is $57,000 or thereabouts.

A. No, see pages 20, 21, Memorandum Opinion of December 18, 1978.

(b) Q. Whether defendant is entitled to a credit for principal and interest payments made on a second mortgage to The Gold Depository and Loan Company, Inc. Defendant claims this mortgage was made to secure borrowings upon the respective units in question on October 6, 1976 and the total of principal and interest payments amounts to $28,749.90.

A. No. This claim was not even litigated.

(c) Q. Whether defendant is obligated to pay the "reasonable rental value" upon apartment unit 801/802 for the period from January 1, 1978 to the present date.

A. The defendants in effect, elaborate upon this question in a pleading filed April 20, 1979 entitled Defendants' Request for Further Clarification of the Court's Formula for Recission, where it is stated in part:

> "Whether, in regard to apartment 801/802, defendant is obligated to make an accounting for the period from January 1, 1978 to present date, where it appears that no monies were received by defendant during the said period, and the tenant, one Marjorie Jawish, has refused to pay any rental whatsoever, contending that title to the premises has been transferred from Kimberly A. Laurins to 2720 Wisconsin Avenue Cooperative Association, Inc., and citing in support thereof this Court's Memorandum Opinion of December 18, 1978. (See copy of complaint filed in D.C. Superior Court against Mrs. Jawish, and her Motion for Summary Judgment, attached hereto)."

The Memorandum Opinion of this court, dated Decembr 18, 1978 (Pgs. 11, 12) as mended by the Memorandum Opinion of January 19, 1979, clearly reflects the obligation of defendants to pay the reasonable rental value of 801/802 to the Cooperative. The lease to Jawish, its aftermath and status during the period in question is irrelevant to the obligation as found by the court of the defendants to the Cooperative.

(d) Q. Whether defendants Wisconsin Avenue Associates, Inc. and/or A. V. Laurins are obligated to pay the "reasonable rental value" of apartment unit 805 during the period of the latter's occupancy as aforesaid. The Court's formula for rescission (P. 12 of Damage Opinion) does not include unit 805 among those designated for payment of reasonable rental value.

A. Yes; see stipulation as to occupancy and as this is implied under the formula for rescission.

THEREFORE, in accordance with the several Memorandum Opinions of the court dated June 27, 1978, Decembr 18, 1978 and

January 19, 1979 and this Memorandum Opinion, it is by the court this 27th day of April, 1979 hereby adjudged, ordered and decreed as follows:

JUDGMENTS

It is HEREBY ADJUDGED, ORDERED AND DECREED THAT pursuant to SCR Civil Rule 54(e) as to:

1. Count I of the Amended Complaint, seeking several declaratory judgments, judgment is hereby entered consistent with the Court's decisions.

2. Count II was subject of a directed verdict by consent and judgment is hereby entered in favor of the defendants.

3. Count III, seeking an accounting, in effect has been granted in light of evidence at both the liability and damage trials and the proceedings before the Auditor-Master.

4. Count IV, breach of contract against VAL Management Company, Inc., plaintiffs recover nothing upon the finding of liability against this defendant because of lack of proof as to damages and judgment is therefore entered in favor of the defendants.

5. Count V is duplicitous of Count IV and judgment is therefore entered in favor of defendants.

6. Count VI, breach of fiduciary duty and unjust enrichment having been found by its verdict in favor of the plaintiffs, judgment is hereby entered in favor of the plaintiffs as follows:

(a) The $945,000 deed of trust dated December 6, 1974 is valid and in force and effect, EXCEPT that Paragraphs 11, 17, 34 and 46 are NULL AND VOID.

(b) The $945,000 deed of trust note dated December 6, 1974 is valid and enforceable.

(c) The $100,000 note dated December 16, 1974 is NULL AND VOID AND CANCELLED.

(d) The $5,700 note dated September 1, 1975 is NULL AND VOID AND CANCELLED.

(e) The plaintiff/Cooperative recover of the defendants Laurins, Norman, Wisconsin Avenue Associates, Inc., Metropolitan Mortgage Bankers, Inc., Real Estate Equity Management, Inc., Scenic Travel, Inc., Real Development Management, Inc. and Conference Management Group, Inc.[1] punitive damages in the amount of $30,700.00, with interest thereon at the rate provided by District of Columbia law (see offset provision in Paragraph 17 of this Order and Judgment).

7. Count VII is duplicitous, in part, of Count VI; the Court having entered its verdict in favor of plaintiffs hereon, in combination with its treatment of Count VI, hereby enters judgment in favor of the plaintiffs.

8. Count VIII was the subject of a directed verdict by consent and judgment is hereby entered in favor of the defendants.

9. Count IX, insofar as it alleges fraud and deceit, resulted in a verdict for the defendants and judgment is entered thereon, however,

(a) Upon the Court's finding that defendants VAL Management Company, Inc. and Wisconsin Avenue Associates, Inc., together with defendants laurins, Norman, Baden, Tompkins and Chasen, who breached their fiduciary duty to plaintiffs, misrepresented the 1975 maintenance budget, the plaintiffs recover of defendants VAL Management Company, Inc., Laurins, Norman, Baden, Tompkins and Chasen nominal damages in the amount of $26.00 ($1.00 per plaintiff), with interest thereon at the rate provided by District of Columbia law; and

(b) The plaintiffs recover of the defendants Laurins, Norman/Wisconsin Avenue Associates, Inc. and VAL Management Company, Inc. puniive damages in the amount of $12,500 ($500.00 per plaintiff-purchaser, 25 plaintiff-purchasers), with interest thereon at the rate provided by District of Columbia law.

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[1] The Corporate defendants, Wisconsin Avenue Associates, Inc., Metropolitan Mortgage Bankers, Inc., Real Estate Equity Management, Inc., Scenic Travel, Inc., Real Development Management, Inc. and Conference Management Group, Inc., are liable in every respect that Laurins himself is liable. *See* Liability Opinion of June 27, 1978 at p. 29.

10. Count X, the Court having found in favor of the defendants, judgment is hereby entered in favor of defendants.

11. Count XI, the Court having found in favor of the defendants, judgment is hereby entered in favor of the defendants.

12. Count XII was dismissed and judgment is herein entered in favor of the defendants.

It is FURTHER ORDERED, ADJUDGED AND DECREED THAT

13. Plaintiffs recover of defendant Laurins, Norman, Wisconsin Avenue Associates, Inc., Metropolitan Mortgage Bankers Associates, Inc., Metropolitan Mortgage Bankers, Inc., Real Estate Equity Management, Inc., Conference Management Group, Inc., Scenic Travel, Inc., Real Development Management, Inc. and VAL Management Company, Inc., $124,245.16 in attorneys' fees and $9,974.48 in general costs, with interest thereon at the rate provided by District of Columbia law.

It is FURTHER ORDERED, ADJUDGED AND DECREED THAT

14. The rights and obligations conferred upon the parties by the Mutual Ownership Contracts and by any other underlying agreements, including and especially the Assignment of Purchase Agreement dated December 6, 1974 (Plaintiffs' Trial Exhibit 25), as to Units 103, 104, 106, 107, 204, 501, 703, 805, 302 and 801/802 are rescinded, with complete right, title and interest in those units vesting only in 2720 Wisconsin Avenue Cooperative Association, Inc. The Court accepts the report of the Auditor-Master and incorporates it by reference into this judgment,[2] and

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[2] Pursuant to a Stipulation of the parties and the Court's Orders of December 18, 1978 and January 19, 1979, the Auditor-Master determined that $131,195.25 was expended by defendant Wisconsin Avenue Associates, Inc. in mortgage and maintenance payments and that plaintiffs were entitled to $104,269.00 in actual rents received by defendant and $20,595.00 as the fair rental value for apartments 302 and 801/802. In addition, the Court has awarded $3,200.00 to plaintiffs as the amount of rental owed by Mr. Laurins for the period of time that he occupied Apart-

It is FURTHER ORDERED, ADJUDGED AND DECREED THAT

15. Defendants, each and all of them, their agents, employees, relatives, attorneys, and assigns, and all those in active concert and participation with them be and hereby are enjoined permanently from performing any act designed to accomplish the sale or further leasing of Units 103, 104, 106, 107, 204, 501, 703, 805, 302 and 801/802; except that defendants, each and all of them, their employees, relatives, attorneys and assigns and all those in active concert and participation with them shall, if requested by plaintiff Cooperative Association, execute such documents, including, but not limited to, deeds, certificates of stock, assignment of leases or any other document required by plaintiff Cooperative Assocition to vest in it all rights and title in the units described, consistent with this opinion.

It is FURTHER ORDERED, ADJUDGED AND DECREED THAT

Plaintiffs' request for an award of costs in excess of those costs awarded in Paragraph 13, *supra*, are denied.

It is FURTHER ORDERED, ADJUDGED AND DECREED THAT

16. Defendants' couunterclaim for recovery on the $100,000.00 note resulted in a verdict for the plaintiffs and judgment in favor of plaintiffs is hereby entered.

17. On defendants' *quantum meruit* counterclaim, the Court entered its verdict in favor of defendant Associates in the total amount of $30,700.00, which consist of $21,334.10 in renovation costs and $9,365.90 in closing costs and rejected all other quantum meruit claims. The Court, therefore enters judgment in favor of defendant Associates in the amount of $30,700.00 against plaintiff Cooperative

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ment 805 and did not pay rent. The net amount of $3,131.21 owed by plaintiffs to defendant Wisconsin Avenue Associates, Inc. may be set off against the monies owed by defendant Wisconsin Avenue Associates, Inc. to plaintiffs as set forth in Paragraph 13, *supra*.

Association. Said judgment is to operate as an offset against the award to plaintiff Cooperative Association set forth in Paragraph 6(e) of this judgment and it is further provided that neither of the judgments are to be otherwise treated or executed upon by the parties.

18. Defendants' counterclaim for recovery on the $5,700.00 note, the Court having found in favor of the plaintiffs, judgment is hereby entered in favor of plaintiffs.

19. Defendants' counterclaim for fraudulent misrepresentation, the Court having found in favor of the plaintiffs, judgment is hereby entered in favor of plaintiffs.

20. Defendants' counterclaim for negligent misrepresentation, the Court having found in favor of the plaintiffs, judgment is hereby entered in favor of plaintiffs.

21. Defendants' counterclaim for interference with contractual relations, the Court having found in favor of the plaintiffs, judgment is hereby entered in favor of plaintiffs.

22. Defendants' counterclaim for breach of fiduciary duty, the Court having found in favor of the plaintiffs, judgment is hereby entered in favor of plaintiffs.

23. Defendants' counterclaim for damage to reputation, the Court having found in favor of the plaintiffs, judgment is hereby entered in favor of plaintiffs.

24. Defendants' counterclaim for reformation, the Court having found in favor of plaintiffs, judgment is hereby entered in favor of plaintiffs.

25. Defendants' counterclaim for declaratory judgment, the Court having found in favor of plaintiffs, judgment is hereby entered in favor of plaintiffs.

26. Defendants; counterclaim for mistake of material fact, the Court having found in favor of the plaintiffs, judgment is hereby entered in favor of the plaintiffs.

27. Defendants' counterclaim for conspiracy, the Court having found in favor of the plaintiffs, judgment is hereby entered in favor of the plaintiffs.

28. Defendants' counterclaim for breach of employment contract by Cecile L. DeRochefort, the Court having found in favor of the plaintiff Cecile L. deRochefort, judgment is hereby entered in favor of the plaintiff Cecile L. deRochefort.

29. Defendants' counterclaim for negligent performance of employment contract by Cecile L. deRochefort, the Court having found in favor of plaintiff Cecile L. deRochefort, judgment is hereby entered in favor of plaintiff Cecile L. deRochefort.

It is FURTHER ORDERED, ADJUDGED AND DECREED THAT

30. Plaintiffs' suit against Security National Bank was disposed of by the granting of summary judgment in favor of defendant Security National Bank prior to trial.

It is FURTHER ORDERED, ADJUDGED AND DECREED THAT

31. Since the parties have each addressed the subject of the amount of a supersedeas bond pending appeal, if any, in this case by anyone or all of the defendants, the Court treats the subject herein and rules that in order to effectuate a stay pending appeal the defendant(s) shall post a bond or undertaking with a surety approved by the Court in the amount of $400,000.00. In setting this amount of bond or undertaking the Court has considered the judgments for specific sums entered herein, the continuing costs to be incurred by further delay, both as to the property involved and litigation expenses, including

additional attorneys' fees that might be sought on appeal and lastly the totality of the judgments as rendered.

/s/ WILLIAM E. STWEART, JR.
William E. Stewart, Jr.
Judge

April 27, 1979

cc: Richard A. Hibey, Esq.
Robert B. Wallace, Esq.
Attorneys for Plaintiffs

E. Leo Backus, Esq.
Attorney for Defendants

* * * *

[ATTACHMENTS OMITTED]

DISTRICT OF COLUMBIA
COURT OF APPEALS

Civil Action No. 2583-76
Civil Action No. 2583-76

No. 79-631 and 79-1103

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*,
Appellants,

v.

2720 WISCONSIN AVENUE
COOPERATIVE ASSOCIATION, INC., *et al.*,
Appellees.

No. 79-1102

GOLD DEPOSITORY AND LOAN COMPANY, INC.,
Appellant,

v.

2720 WISCONSIN AVENUE
COOPERATIVE ASSOCIATION, INC., *et al.*,
Appellees.

FILED FEB 2, 1982

JUDGMENT

This cause came on to be heard on the transcript of record from the Superior Court of the District of Columbia, the briefs and pleadings filed by the parties, and was argued by counsel. On consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby.

ORDERED AND ADJUDGED by this Court that the final judgments and order on appeal herein are affirmed. That portion of the appeal which is directed to the civil contempt citation is moot.

For the Court:

/s/ ALAN I. HERMAN
Alan I. Herman
Clerk of Court

Dated: February 2, 1982.

Opinion per Associate Judge Stanley S. Harris.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 79-631

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*,

No. 79-1102

GOLD DEPOSITORY AND LOAN COMPANY, INC.,

No. 79-1103

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*,
Appellants,

v.

No. 2583-76
2720 WISCONSIN AVENUE
COOPERATIVE ASSOCIATION, INC., *et al.*,
Appellees.

Before: Newman, Chief Judge; Kelly, Kern, Nebeker, *Mack, Ferren, *Pryor, And Belson, Associated Judges.

FILED FEB. 23, 1982

ORDER

On consideration of appellants' petitions for rehearing and rehearing en banc, it is

ORDERED for the merits division* that appellants' petitions for rehearing are denied. It appearing that no judge of this Court has called for a vote thereon, it is

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Chief Judge Newman and Associate Judge Belson have recused themselves from participation in this matter.

FURTHER ORDERED that appellants' petitions for rehearing en banc are denied.

PER CURIAM

Copies to:

Honorable William E. Stewart, Jr.

Clerk, Superior Court

E. Leo Backus, Esquire
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STATUTES INVOLVED

Title 28 of the United States Code, Section 1257 provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, where the validity of a treaty or stature of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United Staes.
>
> "For the purpose of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

The District of Columbia Code (1981 Ed.) provides in pertinent part:

> 1-221. Creation; membership; personnel; vacancies
> (a) There is established a Council of the District of Columbia; and the members of the Council shall be elected by the registered qualified electors of the District.
>
> * * * * * * * * * * *
>
> 1-227. Powers
> (a) . . . the legislative power granted to the District by this Act is vested in and shall be exercised by the Council. . . .
>
> * * * * * * * * * * *

1-241

(a) There is established by the Office of Mayor of the District of Columbia; and the Mayor shall be elected by the registered qualified electors of the District.

1-242. Powers and Duties

The executive power of the District shall be vested in the Mayor who shall be the chief executive officer of the District government.

* * * * * * * * * * *

11-101. Judicial Power

The judicial power of the District of Columbia is vested in the following courts:

* * * * * * * * * * *

(2) The following District of Columbia courts established pursuant to Article 1 of the Constitution:

(A) The District of Columbia Court of Appeals

(B) The Superior Court of the District of Columbia

EXCERPTS FROM COURT PAPERS

In accordance with Supreme Court Rule 21.1(h), the following are excerpts from court papers filed by petitioners in the proceedings below:

1. On The Issue Of Fiduciary Duty

(a) In "Answer of Defendants Wisconsin Avenue Associates, Inc. . . . to the Amended Complaint," it was stated:

> 2.-3. The allegations [of breach of fiduciary duty and unjust enrichment] in paragraph 2 and 3, Count VI of the Amended Complaint are conclusions of law to which no answer is required; to the extent an answer is required such allegations are denied and strict proof is demanded at trial.

(b) In "Defendants' Proposed Findings of Fact and Conclusions of Law" (following liability trial):

> 48. Until the first purchaser signed a contract to purchase a mutual ownership contract, there was no third party existing to whom a fiduciary duty could be served because prior to that time the Cooperative was 100% subsidiary of Associates.

(c) In "Brief for Appellants," filed with the D.C. Court of Appeals:

> We make no effort to address ourselves to the question of the metes and bounds of the duty of a seller — fiduciary, since we are persuaded that no such duty existed in this case.
>
> * * * * * * * * * * *
>
> In the case at bar, the developer was strictly a seller of apartment units, and was not inviting the public to join . . . in a common enterprise for their mutual benefit.
>
> * * * * * * * *
>
> If that be an accurate depiction of the role of the developer, then his status was not that of a fiduciary, but only one of an ordinary seller (at pp. 64-66).

2. On The Issue Of The Court's Authority, Constitutionally, To Impose Punitive Damages For Violation Of A Fiduciary Duty Previously Unknown

In "Petition for Rehearing and Rehearing En Banc," filed with the D.C. Court of Appeals, it was stated in reference to the *ex post facto* imposition of punitive damages:

> Assuredly, serious questions are raised of due process violation under the federal constitution (at p. 5)

3. On The Court's Authority To Set Public Policy In Reference To Clauses Permissible In Deeds Of Trust

In "Brief for Appellants," filed with the D.C. Court of Appeals, it was stated:

> Ordinarily, the question of what the citizenry may or may not do in the conduct of its affairs is one for the legislature. Under our system of government . . . we govern ourselves through our duly-elected representatives. Those representatives — the legislature — are empowered to determine what rules are needed to govern society, and having so determined, pass laws to that effect. Such action on its part would be the defining, formulation and establishment of "public policy."
>
> In the absence of a legislative act barring particular activity, such course of conduct, perforce, would be legal and proper. No other body of government, either the executive or the judiciary, may take it upon itself, whether it be on the theory that it is filling a vacuum in the law or that the legislature has been derelict in its duty, to prohibit such action. If they purport to do so, they would be legislating — passing laws in effect — which they are not authorized to do.
>
> Inasmuch as there is no law in the District of Columbia forbidding the insertion of [such] clauses . . . [the] usage here on its face was valid. The court had no authority to declare it otherwise or to decree that such clauses are to be prohibited (at pp. 49-50).

4. On The Issue Regarding The Court's Failure Following Contract Rescission To Restore The Status Quo

In "Brief for Appellants," submitted to the Appeals Court, the petitioners, in urging that in order to restore the status quo it was necessary to return the units to the developer, stated:

> The remedy of rescission, by definition, means restoring the parties to their original position . . . It is a process of annulling, cancelling, undoing and nullifying.
>
> The court, while taking cognizance of the rule and its import . . . failed to achieve that objective. The transfer of title to the Cooperative ordained by the court was not a restoration to the pre-existing *status quo* . . .
>
> * * * * * * * * * * *
>
> The court in this case. . . . in carrying out its rescission formula, "restored" the units to the Cooperative which had never held, owned or paid for them. The Cooperative's "title" to the units was merely a transitory one conferred only for the specific purpose of turning those same units back to the developer as an intrinsic, inextricable portion of the original sales price of the complex to the Cooperative. The reality of the situation was that the developer had retained the units as a substitute for a cash payment for the complex over and above the purchase-money mortgage (at pp. 32-34).

5. On The Issues As To Whether, Following Contract Rescission, The Failure To Restore The Apartment Units To The Seller Constituted A Divestiture Violative Of Due Process

In "Petition for Rehearing and Rehearing En Banc," filed with the Appeals Court, it was stated:

The Court's Divestiture Of Eleven Apartment Units Belonging To The Developer

> If there was any single ruling by the court that might be considered as an abandonment of the rule of law, as previously known and understood, it was the stripping of the developer of eleven apartment units . . . and handing them over to Cooperative, allegedly because of breach of contract. The breach was non-existent . . .
>
> * * * *
>
> The Appeals panel disposed of this rather incredible ruling of expropriation of over $400,000 in assets in two paragraphs covering less than a single page (at pp. 7-9).

AGENCY AGREEMENT

WHEREAS, Wisconsin Avenue Associates, Inc. is desirous of obtaining title to the real property and improvements located thereon known as 2720 Wisconsin Avenue, N.W., Washington, D.C.; and

WHEREAS, A. V. Laurins and Co., Inc., through its President A. V. Laurins, is desirous of providing its services in negotiating with and acquiring title from the current owners of the property on behalf of Associates;

NOW THEREFORE, Associates and Laurins have entered into the following agreement:

1. Laurins shall negotiate with and obtain the best price it can on the property and execute a purchase agreement therefore in its own name.

2. Laurins shall at all times act as agent for Associates and shall direct title to the property to be taken in the name designated by Associates at time of settlement.

3. This agency shall terminate after settlement has been made on the property and an accounting has been made to Associates by Laurins.

4. Laurins shall be entitled to a fee of $500 plus reimbursement of all expenses for its services payable by Associates after title has been transferred and an accounting has been made pursuant to paragraph 3 hereof.

This Agreement entered into this _____ day of _____, 1974.

ATTEST:

By: CAROL A. TOMPKINS
Carol A. Tompkins
Secretary

ATTEST:

By: JAMES NORMAN
James Norman
Secretary

WISCONSIN AVENUE ASSOCIATES, INC.

/s/ JAMES NORMAN
James Norman
President

A. V. LAURINS AND CO., INC.

By: A. V. LAURINS
A. V. Laurins
President

AGREEMENT

WHEREAS, 2720 Wisconsin Avenue Cooperative Association, Inc. (Cooperative) desires to acquire the property and improvements located at 2720 Wisconsin Avenue, N.W., Washington, D.C. (the Property) for the purpose of converting said Property to a cooperative form of ownership; and

WHEREAS, Wisconsin Avenue Associates, Inc. (Associates) has obtained the right to acquire fee simple title to the Property; and

WHEREAS, Cooperative desires to convert the said Property to a cooperative form of ownership by arranging for the sale of Mutual Ownership Contracts issued by Cooperative to purchasers interested in a cooperative form of living;

NOW THEREFORE, Cooperative agrees to assign to Associates all right, titles and ownership to the said Mutual Ownership Contracts representing 100% ownership of Cooperative for the sole purpose of Associates selling these contracts to others who may wish to buy then, subject, however, to the following terms and conditions:

1. Associates shall arrange for Cooperative to obtain title to the Property pursuant to an Assignment of a Purchase Agreement on the subject Property, said Assignment Agreement to be entered into Concurrently herewith.

2. Associates shall be entitled to no fee from Cooperative for its services other than the assignment of the Mutual Ownership Contracts previously described.

3. Associates shall be totally and completely responsible for all costs involved in promoting, selling, advertising, transferring title, repair and/or renovation of the interior of any dwelling unit or any other cost it may incur in the sale of the Mutual Ownership Contracts.

4. Associates shall not be required to repair or renovate any dwelling unit except to the extent it, in its absolute discretion, may deem advisable to facilitate sale of the Mutual Ownership Contracts.

5. Cooperative agrees to maintain all common areas and facilities in good condition and working order at all times and give Associates access to the Property at all times for any reasonable purpose and to allow Associates to maintain a sales office, if desired, on the premises and to post whatever signs deemed desirable by Associates to promote sales.

This Agreement made this 6th day of December, 1974.

ATTEST:

By: CHARLENE BADEN
Charlene Baden
Secretary

ATTEST:

By: CAROL A. TOMPKINS
Carol A. Tompkins
Secretary

2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC.

By: A. V. LAURINS
A. V. Laurins
President

WISCONSIN AVENUE ASSOCIATES, INC.

By: JAMES NORMAN
James Norman
President

ASSIGNMENT OF PURCHASE AGREEMENT

to

2720 Wisconsin Avenue, N.W., Washington, D.C.

WHEREAS, Wisconsin Avenue Associates Inc. (Associates) has acquired the right to obtain title to the property known as 2720 Wisconsin Avenue, N.W., Washington D.C. (the Property); and

WHEREAS, 2720 Wisconsin Avenue Cooperative Association, Inc. (Cooperative) desires to purchase the Property and convert it to a cooperative form of ownership;

NOW THEREFORE, in exchange for Cooperative executing a wrap-around mortgage in the amount of $945,000, secured by the Property, in favor of Associates and Cooperative further agreeing to give Associates an exclusive agency to develop the Property as a cooperative on terms to be mutually agreed upon between the parties, Associates hereby agrees to assign its right to obtain fee simple title in the Property to Cooperative under the following terms and conditions:

1. Associates shall advance all cash required by Cooperative to enable it to acquire title to the Property. Cooperative shall repay all monies advanced by Associates over a period of twenty-three (23) years from date of settlement with no interest or principal payable the first year, interest only for the second and third years at the rate of 8.5% per annum, and principal and interest payments thereafter at 8.5% per annum until the principal amount has been repaid in full.

2. Simultaneously with closing title to the Property, Cooperative shall execute the wrap-around mortgage referred to herein on a form to be supplied by Associates.

3. Associates shall retain equitable title to the Property until Cooperative has assigned all mutual ownership contracts representing 100 percent ownership in Cooperative to Associates. It is understood that this Assignment is for the purpose of selling these mutual

ownership contracts in Cooperative to persons interested in the cooperative form of home ownership.

This AGREEMENT made this 6th day of December, 1974.

ATTEST:

By: CHARLENE BADEN
Charlene Baden
Secretary

ATTEST:

By: CAROL A. TOMPKINS
Carol A. Tompkins
Secretary

2720 WISCONSIN AVENUE
COOPERATIVE ASSOCIATION, INC.

By: A. V. LAURINS
A. V. Laurins
President

WISCONSIN AVENUE ASSOCIATES, INC.

By: JAMES NORMAN
James Norman
President

2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATES, INC.

MUTUAL OWNERSHIP CONTRACT

This contract made in the District of Columbia, this sixth day of December, 1974, by and between the 2720 Wisconsin Avenue Cooperative Association, Inc. (hereinafter sometimes called the Association) and Wisconsin Avenue Associates Inc. and shall bind all subsequent assignees of this contract by Wisconsin Avenue Associates, Inc.

WITNESSETH

THAT, for and in consideration of the sum of one ($1.00) dollar, each to the other paid, the receipt of which, each from the other is acknowledged, and of the mutual conditions and covenants herein contained, the Association and Associates do mutually agree as follows:

1. Membership Fee: The Association acknowledges that the membership of Wisconsin Avenue Associates, Inc., is only for convenience of the transfer of this mutual ownership contract to an owner for occupancy by way of sale or lease option and therefore that all the rights and privileges of membership are extended to Wisconsin Avenue Associates, Inc. so that it may extend same to owner occupants (hereinafter referred to as Member). No membership fee is required to be paid by Wisconsin Avenue Associates, Inc. The restrictions against transfer or rental shall not apply to Wisconsin Avenue Associates, Inc. or to any lender. All other subsequent transfers, from Wisconsin Avenue Associates, Inc., however, are subject to a two hundred ($200.00) membership fee. Said membership fee shall not be subject to refund.

2. Management: Association shall employ the property management firm designated by Wisconsin Avenue Associates, Inc. for a term of not less than three years from the date of this agreement to manage the affairs of the Association. The property Management firm appointed by Wisconsin Avenue Associates, Inc. shall keep adequate records, collect all moneys on behalf of the Association from Member which are due and payable under this mutual own-

ership contract, make all appropriate disbursements, and render a yearly accounting to the Association showing receipts and disbursements and the amount of interest and taxes paid and allocable to each Member.

3. Voting Rights: Wisconsin Avenue Associates, Inc. shall have an irrevocable proxy coupled with an interest to cast all votes of the Membership of the Association for whatever purpose required for the period of three years from February 1, 1975.

4. Sale and Purchase of Perpetual Use: Subject to all the provisions in this contract and pursuant to the terms of the agreement between the Association and Wisconsin Avenue Associates, Inc. dated December 5, 1974, the Association agrees to assign a right of perpetual use and enjoyment, (hereinafter called the "Perpetual Use"), of apartment number 203 at 2720 Wisconsin Avenue, Washington, D.C. This transfer is effective December 6, 1974.

5. Assessed Value: The assessed value of the Perpetual Use of this apartment is $21,000 which represents 1.55268% of the total assessed value of the property and agreed to represent the ownership interest of member in the Association. This percentage ownership interest cannot be changed by the Association without a unanimous vote of 100% of the members.

6. Monthly Payments and Special Assessments: Member agrees to pay to the Cooperative Association, by the first day of each month, 1/12 of the amount resulting from multiplying the annual budget of the Association times the percentage ownership interest in the Association. In addition, member agrees to pay any special assessment promptly when requested by the Board of Directors. Said special assessment shall be limited to that percentage of the total assessment which is equal to member's ownership interest.

7. Member as Guarantor: Upon assignment or transfer of this contract, a promissory note shall be executed by the new member (assignee) and secured by this mutual ownership contract for the balance due on his/her share of the corporate indebtedness due to the holder of the deed of trust executed by the Association on December 6, 1974 to enable it to acquire title to the property. This promissory note shall be assigned by the Association the holder of the Deed of

Trust previously mentioned as additional security. The annual budget of the Association shall include the payments of principal and interest due on this indebtedness.

8. Application of Payments: The Member agrees to make payments required under paragrpah 6 herein at one time and in one lump sum when due. Any balance of Interest and Operating Payments remaining unpaid shall be added to and become a part of the Purchase Price and bear interest therewith.

9. Occupancy: The Member shall own and use the dwelling covered by this contract as a private dwelling and may enjoy the use, in common with all other members of the Association, of all community property and facilities of the Association, so long as he remains a member of the Association, and abides by all the terms of this Contract. The Member may sublease his dwelling, provided that his tenant be first approved by the Association.

10. Operating Services, Utilities and Reserves: The Association shall (i) provide necessary management and administration of the property, (ii) pay or provide for the payment of all taxes and assessments levied against the property, (iii) procure and pay or provide for the payment for fire insurance on the property (including insurance on the Member's dwelling, but not his personal property), (iv) provide and pay for water, gas and electricity in reasonable amounts, (v) set up reserves to cover vacancy, collection losses, repurchase and future costs of replacements, and (vi) provide and pay for all necessary current repairs, maintenance and replacements of Association property, *except* that the Member shall be responsible for all interior painting and decoration and the repair and maintenance of all kitchen appliances, lighting and bathroom fixtures located in the Member's dwelling. If the Member does not provide such interior repair and maintenance and painting and decorating in a manner satisfactory to the Association, it may have any work performed which in its judgment is necessary and charge the cost to the Member. If such charge is not paid when it accrues, it shall be added to and become part of the unpaid balance of the Promissory Note described in paragraph 7, and bear interest therewith.

11. Current Value: For the purpose of this Contract, the Current Value of the Perpetual Use of the Member's dwelling during any month, shall be the assessed value (as stated in paragraph 5 herein) less 1/12 of 3% of the assessed value for each month (estimated depreciation of the building and equipment), including the current month, which has elapsed since the first day of the month in which this Contract was made.

12. Representation by Member: The Member represents that the dwelling is being purchased for his immediate and personal use and occupancy as a dwelling.

13. Transfer by Gift or Inheritance: The Member may transfer his Perpetual Use of any interest under this Contract by gift, bequest, assignment or otherwise to anyone, provided that if such Perpetual Use or interest is to be transferred to a person other than a member of the Member's family, such person shall not be permitted to occupy the premises without the approval of the Association.

14. Termination of Contract: In the event of default by the Member of any payments or charges required under this Contract, or violation of any other provisin hereof, the Association may terminate this Contract upon ten (10) days written notice to the Member. The Association may terminate this Contract upon thirty (30) days written notice if upon adequate proof its Board of Directors by a vote of four-fifths (4/5) of all the directors shall determine that the Member is undesirable as a resident in the Development. In the event of termination under this paragraph, the Association may, at its election, purchase the Perpetual Use for its current value as set forth in paragraph 10 herein, or sell such Perpetual Use for an amount determined by the Association to be its fair market value. Upon disposition of the Perpetual Use pursuant to this paragraph, the Association shall pay to the Member the amount of the disposal price less the unpaid balance of the Purchase Price and less the estimated cost of painting and decorating (required to be done by the Member pursuant to Paragraph 10 herein), which are necessary to place the dwelling in suitable condition for another occupant.

15. Observances of Mutual Ownership Principles: The Member convenants that he shall preserve and promote the mutual ownership principals upon which the Association has been founded, abide by the By-Laws, and Rules and Regulations of the Association, and by his active cooperation with its other members bring about for himself and his co-members a high standard in home and community conditions.

16. Peaceable Possession: If the Member makes the payments herein required and performs all of the conditions and agreements of this Contract the Association covenants that at all times while this Contract remains in full force and effect, the Member may peaceably have and enjoy the sole use and benefit of the apartment herein above described, and may enjoy, in common with all other members of the Association, the use of all community property and facilities of the Development, provided, however, that the Association shall have a right upon reasonable notice to the member to inspect the premises occupied by such member.

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be signed and sealed on the date and at the place first above mentioned.

ATTEST:

/s/ CAROL A. TOMPKINS
Carol A. Tompkins
Secretary

ATTEST:

By: CHARLENE BADEN
Charlene Baden
Secretary

WISCONSIN AVENUE ASSOCIATES, INC.
(A District of Columbia Corporation)

By: JAMES NORMAN
James Norman
President

2720 WISCONSIN AVENUE
COOPERATIVE ASSOCIATION, INC.
(A District of Columbia Corporation)

By: A. V. LAURINS
A. V. Laurins
President

NULLIFIED CLAUSES IN DEED OF TRUST

The four clauses in the Deed of Trust nullified by the trial court provided, as follows:

"11. Grantor shall save Beneficiary and Trustees harmless from all costs and expenses, including reasonable attorneys' fees, and costs of a title search, continuation of abstract and preparation of survey, incurred by reason of any action, suit, proceeding, hearing, motion or application before any Court or administrative body in and to which Beneficiary or Trustees may be or become a party by reason of this Deed of Trust, including but not limited to condemnation, bankruptcy, and administration proceedings, as well as any other of the foregoing wherein proof of claims is by law required to be filed or in which it becomes necessary to defend or uphold the terms of this Deed of Trust, and all money paid or expended by Beneficiary or Trustees in that regard, together with interest thereon from day of such payment at the rate provided in the note, shall be secured hereby and, shall be payable by Grantor to Beneficiary or Trustees, as the case may be, within five (5) days after demand." (Pl. Ex. 5, p. 8).

"17. In the event of the sale, conveyance, or transfer of all or any part of the Premises by the Grantor, Beneficiary may accelerate the entire principal due on the Note. In the event of a sale, conveyance, or transfer of an interest in the Grantor which includes the right of possession to a part of the Premises, Beneficiary may accelerate that portion of the total indebtedness secured hereby which said owner of an interest in Grantor has secured by executing his promissory note to Grantor pursuant to the provisions of paragraph 27 herein. Beneficiary may at his sole option elect to refinance said portion of this indebtedness for the Grantor if the sale of said interest is made to a person whom the Beneficiary, in its sole judgment, believes to be financially capable of supporting the portion of the indebtedness he will be responsible for. Said refinancing may be made at the highest prevailing legal rate of interest. The primary responsibility of repaying the refinanced portion or portions of the total indebtedness secured by this Deed of Trust shall remain with Grantor."

"34. Grantor covenants and agrees not to exercise any right or privilege or repayment of the Participating Financing and further covenants and agrees not to enter into any agreement

with the holder of the Participating Financing modifying or amending any of the provisions dealing with payment of principal or interest thereunder without the prior written consent of the Beneficiary. In consideration of the financing provided by Beneficiary under the provisions of this Deed of Trust, Beneficiary is irrevocably constituted sole and exclusive agent and attorney in fact for Grantor to arrange, at Beneficiary's sole discretion to refinance any or all of the Participating Financing or debt due under the terms of this Deed of Trust if such action is desired by Beneficiary. Such agency shall include the authorization of the Grantor for Beneficiary to execute on Grantor's behalf all documents required by any lender to accomplish said refinancing. In the event the Grantor shall not have the power to delegate to Beneficiary the performance of any act required to effect said refinancing, Grantor agrees to execute any documents and provide any such affidavits or representations required of a lender to effect said refinancing. Failure of Grantor to cooperate in all respects with the refinancing of the Participating Interest or debt due hereunder shall be deemed a default under the terms and provisions of this Deed of Trust." (App. Pl. Ex. 5, p. 20).

"46. Nothing herein contained nor any transaction related hereto shall be construed or shall so operate either presently or prospectively, (a) to require Grantor to pay interest at a rate greater than is now lawful in such case to contract for, but shall require payment of interest only to the extent of such lawful rate, or (b) to require Grantor to make any payment or do any act contrary to law; but if any clause and provision herein contained shall otherwise so operate to invalidate this Deed of Trust in whole or in part, then such clauses and provisions only shall be held for naught as though not herein contained and the remainder of this Deed of Trust shall remain operative and in full force and effect. If at any time any law or court decree prohibits the performance of any obligation undertaken herein by the Grantor, or provides that any amount to be paid by the Grantor must be credited against the Grantor's obligations under the Note, the Beneficiary will have the right, on ten (10) days' prior notice to the Grantor to require payment in full of the entire indebtedness secured hereby." (Pl. Ex. 5, p. 46).